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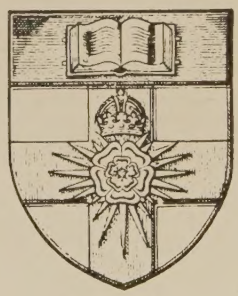

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DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

C. A.
1927
March 24.

FENTON TEXTILE ASSOCIATION, LIMITED *v.* LODGE.

[1925. F. 1677.]

Practice—Discovery—Inspection—Claim against Company—Receiver and Manager for Debenture-holders in Possession—Debenture charged upon Undertaking, Property and Assets of Company—Refusal of Receiver to produce Company's Documents.

A receiver and manager appointed by holders of a debenture secured on the undertaking, property and assets of the company, and having in his possession as receiver all the books of account, records and documents of the company of which he was formerly managing director :—

Held, not to be entitled to refuse production of documents material to an action involving a claim based on an alleged fraudulent conspiracy between him and the company as co-defendants, on the ground that the books and documents are held by him on behalf of the debenture holders, and no longer on behalf of the company as managing director.

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APPEAL from an order of Salter J. in chambers.

The plaintiffs in this action charged the defendants, J. A. Lodge and Wildsmith Carter & Co., Ld., with a conspiracy to cheat and defraud the plaintiffs, by causing one Hickman to part with 153 tons of rag goods and to hand them over to the defendants Wildsmith Carter & Co.

The defendant Lodge was the managing director of the defendant company, who had issued a debenture for 50,000*l.* in favour of their bankers charged by way of a floating charge upon the undertaking and all the property and assets present and future of the company, which debenture was duly registered under s. 93 of the Companies (Consolidation) Act, 1908. During the material dates the defendant company were carrying on business in the ordinary course, but since the matters which were relevant to the action, the debenture holders had gone into possession under the powers in the debenture, and had appointed the defendant Lodge as receiver and manager. The result of this was that Lodge, who had been the managing director of the defendant company, was now the receiver and manager for the debenture holders.

The plaintiffs in the action applied for discovery, and an affidavit was made by the defendant Lodge showing that certain documents had been in his possession when he was managing director of the company and were still in his possession, but in his different character of receiver and manager for the debenture holders. These documents were included in the second part of the first schedule to the affidavit and comprised (*a*) certain privileged documents and "(*b*) certain documents tied up in a bundle marked 'B' and numbered from 1 to 57 and initialled by me. The ordinary current books of account and records of the defendant company," all of which the defendant Lodge objected to produce on the ground that the documents in (*a*) were privileged, and that those in (*b*) were in his possession or power only as receiver and manager for the debenture holders, and that he held those documents only on behalf of the debenture holders and not otherwise.

The Master refused the plaintiffs' application to inspect the documents referred to in the affidavit, but Salter J. made an order that the plaintiffs be at liberty to inspect the documents mentioned in the latter part of (*b*)—namely, the ordinary books of account and records of the defendant company, and that as to the documents mentioned in the earlier part of (*b*) the matter be referred back to the Master to look at the documents and see whether they were necessary to the preservation of the debenture security.

From this order the defendant Lodge appealed. The appeal was heard on March 24, 1927.

P. B. Morle for the appellant. The documents in question are in the possession of the receiver on behalf of the debenture holders as their agent, and if the company had not delivered them to him the Court could have compelled their delivery. The receiver is the agent of the debenture holders: *Deyes* v. *Wood* (1), and it is sought to ask the Court to order him to produce documents which belong to them. In the winding up of a company the Court has ordered delivery of books and documents to the liquidator; in *In re Capital Fire Insurance Association* (2), where they had come into the hands of the company's solicitor, who claimed a lien on them, and in *Engel* v. *South Metropolitan Brewing and Bottling Co.* (3), where they had come into the hands of the receiver and manager for debenture holders under the order appointing him, but both those cases show that the right of the mortgagee was clearly recognized. There is no winding up here, for the receiver and manager is still carrying on the business of the company. The company has no right to see these documents in order to protect itself in this action. In *General Assets Purchase Co.* v. *Chesterton Coal and Iron Co.* (4) it was held that the words of charge did not cover the books, but in this case I submit that they do.

[SCRUTTON L.J. Do you suggest that this Court should

(1) [1911] 1 K. B. 806.
(2) (1883) 24 Ch. D. 408.
(3) [1892] 1 Ch. 442.
(4) (1888) 32 Sol. J. 645.

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say that the view taken by Chitty J. in *In re Clyne Tin Plate Co.* (1) was wrong ?]

I submit that if the company has itself parted with its books without reserving a right to inspect them, it cannot obtain inspection.

Murphy for the respondent. I rely upon *Engel* v. *South Metropolitan Brewing and Bottling Co.* (2), the decision in which did not turn upon the position of the liquidator but upon the statutory duties of the company to have in its possession the books and documents relating to its management and business. There are many sections of the Companies (Consolidation) Act, 1908, which necessitate that a company shall have the custody of its books, which do not pass under a charge of this sort: *Engel's* case (2); *General Assets Purchase Co.* v. *Chesterton Coal and Iron Co.* (3); *In re Clyne Tin Plate Co.* (1) A receiver is not only the agent of the debenture holders, he is for some purposes the agent of the company: per Warrington J. in *Robinson Printing Co.* v. *Chic, Ld.* (4)

[LORD HANWORTH M.R. referred to *In re Ind, Coope & Co.* (5), where the custody of deeds was given to the receiver for debenture holders.]

That was a case dealing with the title deeds of the mortgaged property, but I submit that the books of the company do not pass under this charge.

Morle in reply.

LORD HANWORTH M.R. This appeal must be dismissed. At first sight it would seem that there was a serious point involved and open to the appellants, but I have come to the conclusion that this is not the moment at which these questions can be decided. [His Lordship stated the facts and continued:] Attention has been called to the fact, as no doubt is the case, that the position of the receiver on behalf of the debenture holders is very different from that of the managing director, and that documents held by a man as managing director are held in a different character when

(1) (1882) 47 L. T. 439.
(2) [1892] 1 Ch. 442.
(3) (1888) 32 Sol. J. 645.
(4) [1905] 2 Ch. 123, 132.
(5) (1909) 26 Times L. R. 11.

held by him as receiver and manager on behalf of the debenture holders; that is true, but in the two cases which have been referred to, decided by Chitty J., it is quite plain that there are some documents of a company which cannot be parted with or pledged or dealt with by the company in the sense that they are integral documents necessary to the company itself, and for the purpose of compliance with its duties which are imposed upon it under the Companies (Consolidation) Act, 1908. No exact and precise line has been drawn defining what those documents are. It is, however, said in the cases that documents of title, which relate to the title of the debenture holders, would not be taken from their custody or possession.

With those two broad lines before me, I have to see whether the appellants here have established that the order of Salter J. was wrong. I take note of the fact that Warrington J. in *Robinson Printing Co.* v. *Chic, Ld.* (1), says that the manager and receiver appointed by the debenture holders is their agent, "but I think he is also for some purposes the agent of the company." It appears to me that on an interlocutory application of this sort, particularly in a case where the defendants are charged with a very serious misfeasance, it would be wrong to determine, and unfortunate if one had to determine, that these documents could not be examined, because they may be very material to the plaintiffs' case and to the defendant Lodge's own case.

I have come to the conclusion that no exact or precise line can be drawn, and that there may be documents which, while one respects the rights of the debenture holders and the duties of control placed by them in their receiver and manager, are yet such that the company itself would have a right, which the Court would respect and enforce, of obtaining access to them for the purposes of such a case as the present. In those circumstances it appears to me that the appellant fails to make out a justification for dismissing the order made by Salter J., but I think we can accede to the appellant's application to this extent, that inasmuch as

(1) [1905] 2 Ch. 123, 132.

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the affidavit of documents he made was made in the confident expectation that no inspection would be ordered, we ought to give him liberty to file a fresh affidavit of a more specific character dealing with the documents which he has in his possession, and recognizing the fact that such documents as are material will have to be produced for the purposes of the action. Subject to that liberty to him, the appeal will be dismissed with costs.

SCRUTTON L.J. This case raises a rather curious point. The action is brought by a company alleging that in 1921 a person, who was then apparently either managing director or receiver of the plaintiff company, entered into a conspiracy with a person named Lodge, and with a company of which Lodge was managing director, to defraud the plaintiff company of certain property. In that action Lodge filed an affidavit of discovery, disclosing documents that he had in his possession. It was obviously somewhat carelessly framed, but one must assume that it was intended to state that in his possession there were certain documents which contained entries material to the dispute. Having dealt with those documents in this way, "certain documents tied in a bundle marked 'B' and numbered from 1 to 57 and initialled by me," there is no doubt what documents those are; but as to "The ordinary current books of account and records of the defendant company," it is perfectly certain that there are many of those ordinary current books of account and records of the defendant company going down to 1926, which have nothing whatever to do with the dispute in 1921, and we are in the position that at present the defendant Lodge has not made a satisfactory affidavit stating what documents material to the dispute are in his possession. Clearly, therefore, the first step is that he should be ordered to look into his affidavit, and only include in it such documents as are material. I will assume that has been done for the purposes of the rest of the judgment.

Then he says in effect: "Though I disclosed that I had had in my possession these particular documents, I decline

to produce them for inspection, because I hold them as receiver and manager for the debenture holders; therefore, while they are in my possession, they are in my possession as agents for an independent person, and, therefore, I need not be ordered to produce them." Of course, that is quite right and perfectly elementary. You do not, if you bring an action against a man personally, who happens to be a trustee for somebody else, discover documents which he holds as trustee for his cestui que trust. If you bring an action against a man you do not get discovery of documents which his solicitor holds as his own property as well as the property of his client.

It seems to me that the position is quite different here, because this receiver for the debenture holders, and the debenture holders themselves, hold these documents subject to the company's right to redeem them. I will not profess to decide, because I do not know, what these documents are, or how many of them really passed to the debenture holders by the debenture. I think it is very probable that a good many of them did not pass at all in law to the debenture holders or their receiver by the operation of the debenture. But I am quite clear that those which did pass as documents of title to the debenture holders passed with a right of redemption by the company; that the company has some rights in them; and that the company has a right for the purposes of its own defence to inspect documents which are in the possession of the receiver for the debenture holders. It is incredible that a company attacked should not be able to see its material documents because, by granting a debenture, it has placed them in the possession of the debenture holders. It has a right to redeem them, and it must, in my view, for its own defence, have a right to inspect them, and that right of inspection of the company can be used by those suing the company, who have a right against the company to claim production and inspection, and, therefore, can use the company's right to see those documents in the possession of Lodge. In this case the elementary justice of that is obvious, because Lodge is one of the persons charged with

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the fraud, and it seems to me contrary to all principles of justice that Lodge, having in his possession documents material to disputes in which he and his company are charged with fraud, should be able to refuse on behalf of his debenture holders all inspection of those documents which are admitted to be material to the dispute between himself and his company on the one hand, and the plaintiff on the other. I cannot conceive that Lodge has a right to take away from the company the right of defending itself by looking at the documents in his possession which are material to the dispute in a case where his company is being accused of fraud in collaboration with him.

The only further remark I make is, that I am not quite certain that the last paragraph of the order of the learned judge goes quite so far as it ought. Supposing that the Master looks at the documents and finds that some are documents of title, it does not appear to me, for the reasons I have given, that that will at all deprive the plaintiffs of the right to inspect. He is not taking away the documents from the debenture holders. But the company will have an equal right to see for its defence documents which are not documents of title. It seems to me at present that the debenture holders will have no right at all to have in their possession documents which are not documents of title, but even as to documents of title the same right of inspection by the company appears to me to exist.

For these reasons I think the appeal should be dismissed. The defendant also should put himself in order by making a proper affidavit of discovery, stating which documents in his possession are material to the dispute, and then there should be a right to inspect those documents which he has said are material to the dispute.

Appeal dismissed.

Solicitors for appellants: *Jaques & Co., for Scholefield, Taylor & Maggs, Batley.*

Solicitors for respondents: *Stephenson, Harwood & Tatham.*

R. M.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1927 *April* 1. C. A. *May* 24.

ATTORNEY-GENERAL *v.* PAINE.

Insurance (Unemployment)—Failure of Employer to pay Contributions—Summons—Conviction and Order to pay Contributions for preceding Year—Right to recover other Contributions in civil Action—Unemployment Insurance Act, 1920 (10 & 11 *Geo.* 5, *c.* 30), *s.* 22, *sub-ss.* 2, 3, 6.

An order made in summary proceedings against an employer under the Unemployment Insurance Act, 1920, s. 22, requiring him to pay contributions in respect of an employee during the year preceding the date when the information was laid, does not prevent the recovery from the employer of other unpaid contributions in respect of the same employee by means of civil proceedings :—

So *held* by the Court of Appeal, reversing the judgment of Rowlatt J.

INFORMATION at suit of the Attorney-General.

The defendant, E. J. Paine, of Wisbech, employed one A. G. Leahy between April 14, 1924, and February 6, 1926, and one G. Denmark between July 7, 1924, and February 6, 1926, and at the date of the summonses mentioned below he had failed to pay in respect of these two insured persons under the Unemployment Insurance Acts, 1920 to 1925, contributions which amounted in all to 10*l.* 15*s.* 11½*d.* A summons dated April 14, 1926, was served upon the defendant, requiring him to appear before a court of summary jurisdiction at Wisbech for his failure to pay a contribution for a specified week in respect of Leahy ; and by a notice of the same date the defendant was informed that in the event of his conviction it was intended to give evidence of his failure to pay other contributions during the preceding year in respect of Leahy. Another summons and another notice of the same date, and substantially to the same effect as those above mentioned, were served upon the defendant in respect of Denmark.

On the hearing of the summonses evidence was given of the defendant's failure to pay other contributions during the preceding year, and an order was made requiring the defendant to pay on such summonses 2*l.* 10*s.* and the contributions to which each summons related, and also other contributions mentioned in the notices amounting with those on the

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summons to 5*l.* 3*s.* 1*d.* The defendant duly paid these fines and the amount of these contributions.

By an information dated October 15, 1926, the Attorney-General claimed from the defendant the sum of 5*l.* 0*s.* 2½*d.*, being the whole amount of the unpaid contributions less the amount of those paid under the order of the justices, and a sum of 12*s.* 8*d.* for uncancelled stamps.

The defendant, in his plea, said, among other things, that the sum paid by him pursuant to the order of the justices was paid under s. 22, sub-s. 3, of the Act of 1920 (1), and was, by the provisions of that Act, to be treated as a payment in satisfaction of all the unpaid contributions.

C. W. Lilley for the informant. The informant is entitled to recover from the defendant in this Court the contributions still remaining unpaid in respect of these two employed persons. It is true that under the Unemployment Insurance Act, 1920, s. 22, summary proceedings before the justices were taken against the defendant for failing to pay contributions in respect of these persons, and as to each of these

(1) The Unemployment Insurance Act, 1920, provides:—

Sect. 22: "(2.) If any employer . . . . has failed or neglected to pay any contributions which he is liable under this Act to pay . . . . he shall, for each offence, be liable on summary conviction to a fine not exceeding ten pounds.

"(3.) Where an employer has been convicted under the foregoing provisions of this section of the offence of failing or neglecting to pay any contribution under this Act, he shall be liable to pay to the unemployment fund a sum equal to the amount which he has so failed or neglected to pay, and on such a conviction, if notice of the intention to do so has been served with the summons or warrant, evidence may be given of the failure or neglect on the part of the employer to pay other contributions in respect of the same person during the year preceding the date when the information was so laid, and on proof of such failure or neglect the employer shall be liable to pay to the unemployment fund a sum equal to the total of all the contributions which he is so proved to have failed or neglected to pay.

"Any sum paid by an employer under the foregoing provision shall be treated as a payment in satisfaction of the unpaid contributions. . . . ."

"(6.) Nothing in this section shall be construed as preventing the Minister from recovering any sums due to the unemployment fund by means of civil proceedings, and all such sums shall be recoverable as debts due to the Crown, and without prejudice to any other remedy may be recovered by the Minister summarily as a civil debt."

persons an order was made requiring the defendant to pay a fine and unpaid contributions during the year preceding the commencement of the proceedings; but the fact that these orders were made does not prevent the informant from recovering the other unpaid contributions in respect of each person for the period of employment preceding the commencement of that year.

Linton Thorpe for the defendant. The defendant is not liable to pay in respect of these two employed persons any contributions beyond those which he has already paid. Under the Act of 1920, s. 22, summary proceedings may be taken against the employer either for a penalty only, or for a penalty and for payment of unpaid contributions during the preceding year. Here the Minister of Labour adopted the latter course and obtained an order for payment of unpaid contributions during the preceding year. Having adopted that course the Minister is precluded from taking proceedings for the recovery of any other contributions. The last part of sub-s. 3 of that section provides that any sum paid by the employer under that sub-section "shall be treated as a payment in satisfaction of the unpaid contributions." These words mean that the sum paid is to be in satisfaction not only of the contributions during the preceding year but of all the unpaid contributions. If it had been intended that the sum paid should be in satisfaction only of the contributions during the preceding year the words would have been in satisfaction of "the said" unpaid contributions. The object of that provision is to give to an employer who has obtained an order for payment of a sum under the section a defence to any action for the recovery of further contributions. Sub-s. 6 means that nothing in the section shall prevent the Minister from recovering sums due by means of civil proceedings, provided he has not recovered any sum under the section.

Lilley in reply. The last part of sub-s. 3 provides that any sum paid under the sub-section shall be in satisfaction of "the" unpaid contributions, which means the contributions referred to in the sub-section, that is the contributions

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during the preceding year. These words are not mere surplusage but were naturally and properly introduced into this section of the present Act, as may appear by comparing the section with the corresponding provisions of the former Acts—namely, the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 69, sub-s. 2; s. 101, sub-s. 2; the National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 34, sub-s. 3: see *Fishwick* v. *Gyani*. (1)

ROWLATT J. In this case the defendant has been summarily prosecuted under the Unemployment Insurance Act, 1920, s. 22, for his alleged failure to pay contributions in respect of two persons employed by him. On the hearing of the summonses an order was made by the justices requiring the defendant to pay a fine in respect of each of these two persons, and also requiring him, under sub-s. 3 of that section, to pay contributions in respect of each of them during the preceding year of the employment. The Crown by information now claims from the defendant further unpaid contributions which could not be recovered in the summary proceedings before the justices. I desire to point out in the first place that the only unpaid contributions which can be recovered before the justices under the section are contributions in respect of the same employed person to whom the prosecution of the employer relates, and I do not think that any of the unpaid contributions contemplated by the section are contributions in respect of other employed persons. The scheme of s. 22 of the Act is as follows: Under sub-s. 2 of that section an employer who has failed to pay a contribution for which he is liable can be summarily convicted and sentenced to pay a fine; and under sub-s. 3 where he has been so convicted he can be ordered to pay the amount of that contribution, and also, if notice and evidence have been duly given, other unpaid contributions in respect of the same employed person during the year preceding the commencement of the summary proceedings. The latter sub-section then provides

(1) [1925] 1 K. B. 617.

that any sum paid under the section should be treated as a payment in satisfaction of the unpaid contributions.

The question is whether, when these proceedings have been taken, civil proceedings can be taken in debt for the recovery of further unpaid contributions. In my view civil proceedings cannot be taken for the recovery of further contributions, and the defendant is entitled to succeed. Where the jurisdiction of the justices under the section has been invoked and they have made an order that is the only remedy that can be relied on, and the Minister must rest satisfied with the consequence that the contributions which he can recover are limited to the preceding twelve months. The Court does not favour a construction of the Act according to which the demand may be split up, with the result that the defendant might be harassed by proceedings in two different tribunals for the same debt. That result is not intended by the Act. On the prosecution of the defendant under the section the justices may not be asked to make an order for payment of unpaid contributions, but, if they are asked to do so, then the order which they make exhausts the remedy of the Minister for unpaid contributions.

It is said, however, that sub-s. 6 gives the Minister the right to sue for the arrears. In my opinion that sub-section does not touch the matter. It provides that nothing in the section shall be construed as preventing the Minister from recovering any sums due to the unemployment fund by means of civil proceedings. It is directed to excluding the application of the principle that when special means are provided for enforcing a liability that ousts the general remedy which the law has provided. It was inserted for the purpose of making it clear that while the Minister may proceed before the justices for the recovery of contributions he is not bound to do so, but may refrain from doing so and proceed by a civil action in the ordinary way for the recovery of the money which is due. It does not mean that he can collect as much as possible under the criminal process and then sue for the balance in a civil action. The

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Minister has adopted the course provided by the section, and this action therefore fails.

Judgment for defendant.

J. R.

The informant appealed. The appeal was heard on May 24, 1927.

Sir Thomas Inskip S.-G. and *C. W. Lilley* for the appellant.

Linton Thorpe for the respondent.

The arguments used in the Court below were substantially repeated. The following provisions of the Act of 1920 were referred to: s. 1; s. 5, sub-ss. 1, 2, 3; ss. 6, 14; s. 22, sub-ss. 1, 2, 3, 6; s. 23, sub-s. 1; Sch. IV., rr. 1, 2, 3, 4, 9.

LORD HANWORTH M.R. This appeal must be allowed. By s. 1 of the Unemployment Insurance Act, 1920, employed persons as defined by reference to the schedule are to be insured against unemployment and by s. 2 persons so insured are to receive unemployment benefit. Then by s. 5 it is provided that certain contributions are to be made by (inter alios) the employers, and that "every employer . . . . shall be liable to pay contributions at the rates specified in Part I. of the Third Schedule to this Act." After that there is a provision in s. 14 for the establishment of the unemployment fund into which contributions payable by the employer, the employed, and the State are to be paid and to be accumulated. The possibility of failure on the part of the employer to make the contributions due according to the scale of the Act is contemplated, and by s. 22 provision is made for taking legal proceedings against a defaulting employer. By sub-s. 2 of that section it is provided that if an employer or an employed person has failed or neglected to pay any contributions which he is liable under the Act to pay, or in other cases, such as if he deducts or attempts to deduct some portion that he ought not to deduct, then the person, be he employer or employed person, shall for each offence be liable on summary conviction to a fine not exceeding ten pounds.

Now what is the offence? It is that on each separate occasion when he ought to fulfil a duty he has failed or neglected to fulfil that duty. Inasmuch as these contributions are for the most part payable weekly, if there is a failure in each week to pay, then there is an offence for which the employer or employed person, if he has neglected or failed to do what he ought to have done, can be brought before the magistrates, and, if convicted, he is liable on summary conviction to a fine. So far, therefore, there is a punishment provided in respect of his failure and neglect to fulfil his duty, be he employer or employed, under the Act. Then sub-s. 3 goes on to provide that in the case of an employer who has been so convicted of failing or neglecting to pay any contribution the employer is to be liable to pay to the unemployment fund a sum equal to the amount which he has so failed or neglected to pay: in other words, upon the conviction, the basis of which was a failure or neglect to pay a sum due from the employer to the unemployment fund an order may be made upon that man to pay a sum which is no longer styled "the contribution," but is a sum equal to the amount which he has failed or neglected to pay, proof of which has already been given, and proof of which forms the basis on which he has been convicted under sub-s. 2. Provision is further made by sub-s. 3 that where there is a case of failure to pay on the part of an employer and there has been a conviction, a notice may be served upon the employer requiring him to pay other contributions in respect of the same employed person during a term which is specified as "the year preceding the date when the information was so laid." In respect of such contributions which the employer has failed or neglected to pay, there must be proof of such failure or neglect; they do not fall, as Sargant L.J. has pointed out, within the proof which has been given and which was the basis of the conviction under sub-s. 2. If and when proof has been given of the failure or neglect of the employer during that specified time, then an order can be made for payment to the unemployment fund of a sum

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equal to all the contributions which he the employer is so found to have failed or neglected to pay.

Are those sums which the employer has been so ordered to pay, sums which are to be taken in satisfaction pro tanto of his liability and in respect of his failure during the twelve months? That is made clear by the last words of sub-s. 3, namely: "Any sum paid by an employer under the foregoing provision shall be treated as a payment in satisfaction of the unpaid contributions." That is to say, after the order to pay has been made on the employer and the sum has been paid, then the employer is no longer liable to pay contributions over that period of time which he has failed to pay at the proper moment, but there is this penalty upon him, that the employer cannot recover a portion of those sums which he has been ordered to pay, and of which, if paid at a proper time, he would be able to recover an aliquot part from the employed person.

So far we have a scheme under which there is a remedy before the magistrates upon the failure of the employed or employer, and in particular, under sub-s. 3 to which I have referred, a particular right against an employer by which he can be compelled to pay sums due over a period of months previous to the conviction. Rowlatt J. has considered that that remedy was a special or a specific remedy under the Act, and perhaps prima facie intended to be an exclusive remedy, and has interpreted sub-s. 6 as according with this view. The earlier words of sub-s. 6 are these: "Nothing in this section shall be construed as preventing the Minister from recovering any sums due to the unemployment fund by means of civil proceedings." Rowlatt J. appears to have thought that the scheme provided under sub-ss. 2 and 3, although not entirely exclusive, was one which, if once put into force at the election of the Minister, excluded any other remedy, and although, therefore, sub-s. 6 left him with an alternative not to follow the scheme of sub-ss. 2 and 3, yet if he followed it he could not put in action any other method of recovering the sums due which the employer had failed to pay.

But that construction appears to me to overlook the terms of the latter portion of sub-s. 6, which provides that: "And all such sums"—that is all the sums due to the unemployment fund—"shall be recoverable as debts due to the Crown, and without prejudice to any other remedy may be recovered by the Minister summarily as a civil debt." Those words appear plainly to indicate that it is not a mere alternative that is offered to the Minister either to proceed under sub-ss. 2 and 3 or not at all, but that the right given to him is cumulative, and, even although he may have proceeded and recovered some contributions under sub-s. 3, he is still left in possession of his other rights under the Act, and in respect of all such sums as are recoverable and due, he may still recover them as debts due to the Crown, and that he may do so without prejudice to any other remedies which he may have. Under those circumstances, I am unable to accept the view of Rowlatt J., which he puts in these words, that the section has the effect of saying that the Minister can collect as much as possible under the criminal process, but that he cannot sue for the balance in a civil action. His judgment seems to say that the two possible remedies are mutually exclusive and cannot both be enforced. A close examination of the terms of s. 22 appear to me to point in the other direction.

For these reasons I am of opinion that the Attorney-General's right to obtain these contributions in the present information is preserved to him, and inasmuch as the figures and liability are not contested, there must be judgment entered upon the information for the sum that is due, the appeal being allowed with costs.

SCRUTTON L.J. I agree, and I should not add anything to the judgment which has just been delivered but for the fact that we are differing from the learned judge below, though I am bound to say that but for his judgment I should have thought that this case was pretty clear.

The employer, who every week in respect of a particular workman ought to put a stamp on an employment card

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representing the joint contributions of workman and employer to the unemployment fund, has failed to do so, and he has failed to do so for a period of more than a year before the date of the information. He has consequently incurred a liability to a summons for each week in which he has failed to stamp the card, and he has incurred a civil liability to the unemployment fund for an amount of money in respect of each week. He is prosecuted under the provisions of s. 22 of the Act of 1920 for an offence in respect of one week, and Parliament has thought fit to provide that when he is prosecuted for that offence in respect of one week the Minister may, if he gives notice of his intention to adduce certain evidence, give evidence of the failure or neglect on the part of the employer to pay other contributions in respect of the same person during the year preceding the date when the information was laid. The Minister did give such notice and proved non-payment for a year preceding the date when the information was so laid. Thereupon, it is provided by sub-s. 3 of the section that "on proof of such failure or neglect the employer shall be liable to pay to the unemployment fund a sum equal to the total of all the contributions which he is so proved to have failed or neglected to pay"—that must mean proved after notice to have failed during the year before the information—and that "Any sum paid by an employer under the foregoing provision shall be treated as a payment in satisfaction of the unpaid contributions." What unpaid contributions? The unpaid contributions during the year before the information which he has given notice of his intention to prove and which are equal to the sum which the employer has been ordered to pay. In construing the words of the section they appear to me plainly to contain nothing with reference to his liability for the contributions previous to the year before the date of the information; they are expressly dealing with the contributions within the year and not before the year. Therefore, on the plain words of the section, I should have thought there was no difficulty in recovering the contributions before the year, and that there was no reason whatever why a person who

has been breaking the law should be let off from the contributions that he owed.

But the matter does not stop there. Rowlatt J.'s judgment has prevented the Minister from recovering certain sums due to the unemployment fund in civil proceedings—namely, the sums due in respect of contributions for the year before the information. But sub-s. 6 says: "Nothing in this section shall be construed as preventing the Minister from recovering any sums due to the unemployment fund by means of civil proceedings." What in Rowlatt J.'s opinion prevents the Minister from recovering? It seems to me quite clear that he had held that taking proceedings in pursuance of and in accordance with the section has prevented the Minister from recovering the sum. I am afraid I am not able to follow his distinction between "nothing shall prevent" and "nothing in this section shall prevent." The proceedings taken under the section appear to me only to have effect by reason of the section.

For these two reasons, which I have put shortly, I think the learned judge came to a wrong conclusion, and that judgment must be entered on the information with costs here and below.

SARGANT L.J. I am of the same opinion. I think the two crucial questions here are what is the meaning of the phrase "the unpaid contributions" in the second paragraph of sub-s. 3 of s. 22, and what is the meaning of sub-s. 6 of the same section. On both points I agree entirely with the judgments which have been delivered, and I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *Solicitor to Ministry of Labour.*

Solicitors for respondent: *Withers, Bensons, Currie, Williams & Co., for Metcalfe, Copeman & Pettefar, Wisbech.*

W. I. C.

C. A.

1927

March 17, 18, 21; *April* 6.

[IN THE COURT OF APPEAL.]

LEWIS *v.* GUEST, KEEN AND NETTLEFOLD, LIMITED.

WATKINS *v.* SAME.

TUCKER *v.* SAME.

INGRAM *v.* CRAWSHAY BROTHERS (CYFARTHA), LIMITED.

Workmen's Compensation—Accident—Partial Incapacity—Injured Workman given light Work in lieu of Compensation—Strike—Inability of Employer to continue light Work owing to abnormal State of Labour Market—Reviver of Right to Compensation—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

Workmen who had been partially incapacitated by accidents arising out of and in the course of their employment were given light work by their employers in lieu of compensation. Subsequently, owing to the abnormal conditions of the labour market caused by a general strike, the employers were prevented from any longer providing them with light work:—

Held, that on the cesser of the light work the right of the workmen to be paid compensation revived notwithstanding the fact that in the circumstances they would have been unable to obtain employment even if uninjured.

Cardiff Corporation v. *Hall* [1911] 1 K. B. 1009; *Harwood* v. *Wyken Colliery Co.* [1913] 2 K. B. 158; *Gaffney* v. *Chorley Colliery Co.* (1922) 15 B. W. C. C. 158; *Portland Colliery Co.* v. *Murray* [1923] A. C. 566 applied.

APPEALS from decisions of the judge of the county court of Merthyr Tydfil sitting as arbitrator under the Workmen's Compensation Acts.

The four appeals raised the question how far compensation payable to workmen was affected by economic or industrial conditions and the possibility of the workman obtaining employment under them. The appeals were heard consecutively by the Court of Appeal on March 17, 18 and 21, 1927.

The statement of facts in each case is taken from the written judgment of the Master of the Rolls.

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"John Lewis, now sixty-four years old, had been employed by the respondents since he was twelve years of age, and was at the date of his accident on October 6, 1904, a haulier at

the respondents' coal mine. From the accident he lost his left arm, which was amputated above the elbow joint. He was out of employment for twelve months, and thenceforward was employed by the respondents in oiling machinery until September 22, 1924, when the pit was closed for economic reasons. On September 25, 1925, the applicant commenced proceedings for an award claiming compensation as from September 22, 1924, based on partial, but permanent, incapacity. By their answer the respondents disputed liability, and claimed that the applicant was not incapacitated for his ordinary work. The hearing was delayed until the case of *Palmer* v. *Crawshay Brothers, Ld.* (1), had been decided, which it was supposed would decide the claim of Lewis. That case was decided by this Court on April 28, 1926. On October 20, 1926, the cases of Lewis and the others were heard, and on January 19, 1927, the learned judge delivered judgment deciding against the workmen in all four cases, and from that judgment the workmen appeal. The Act under which this case is to be decided is the Workmen's Compensation Act, 1897; and not that of 1906, which the learned judge appears to have followed. It is this later Act that contains the words in the Schedule, Sch. I., para. 3, first introduced into it, on which stress is laid by the learned judge."

Cave K.C. and *A. T. James* for the appellant. This case falls under the Workmen's Compensation Act, 1897, repealed by the Act of 1906, s. 16, sub-s. 2, but preserved in respect of cases where the accident happened before the commencement of the later Act.

The county court judge disregarded the authority of *Cardiff Corporation* v. *Hall* (2) and in so doing misdirected himself. It has never been suggested that that case is no longer an authority. It was approved by Lord Shaw in *Ball* v. *William Hunt & Sons* (3), which decided that if a workman's chance of obtaining employment was diminished, that was the subject of compensation. *Bevan* v. *Energlyn Colliery*

(1) (1926) 19 B. W. C. C. 164. (2) [1911] 1 K. B. 1009.
(3) [1912] A. C. 496, 509.

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Co. (1) is quite consistent with *Cardiff Corporation* v. *Hall.* (2) *Woodilee Coal and Coke Co.* v. *M'Neill* (3) and *Heathcote* v. *Haunchwood Collieries, Ld.* (4), which the judge relied upon as being contrary to *Cardiff Corporation* v. *Hall* (2), have really nothing to do with it. No doubt whatever was thrown upon the decision in *Cardiff Corporation* v. *Hall* (2) by *Kear* v. *Shelton Iron, Steel and Coal Co.* (5); *Foster* v. *Wharncliffe Woodmoor Colliery Co.* (6); *Gaffney* v. *Chorley Colliery Co.* (7); or *Palmer* v. *Crawshay Brothers, Ld.* (8)

Further, it is submitted that where there are two concurrent causes of inability, so long as one remains, the workman's right to compensation is not affected: *Cory Brothers & Co.* v. *Hughes* (9); *McNally* v. *Furness, Withy & Co.* (10); *Harwood* v. *Wyken Colliery Co.* (11)

Then the judge claimed the right to decide as a matter of discretion, but on which he had no evidence, what amount he would award in a particular case. He has accepted something as a fact on which there was no evidence. He has found as a fact that the workman would have been out of employment even if he had been sound, and that he would not have found other work in the neighbourhood. There was no evidence to support that finding.

Wingate-Saul K.C. and *W. Shakespeare* for the respondents. The case being an original application by the workman for compensation the onus was on him to prove injury and incapacity for work arising therefrom: *Harwood* v. *Wyken Colliery Co.* (12) The question was one of fact for the county court judge—namely, was the workman prevented from earning wages by reason of incapacity arising from the accident, or was he prevented from doing so by reason of the state of the labour market or some extraneous cause? On the evidence it is submitted that the county court judge

(1) [1912] 1 K. B. 63.
(2) [1911] 1 K. B. 1009.
(3) [1918] A. C. 43.
(4) Ibid. 52.
(5) (1921) 14 B. W. C. C. 121.
(6) [1922] 2 K. B. 701.
(7) 15 B. W. C. C. 158, 161.
(8) 19 B. W. C. C. 164.
(9) [1911] 2 K. B. 738.
(10) (1913) 6 B. W. C. C. 664.
(11) [1913] 2 K. B. 158.
(12) [1913] 2 K. B. 158; 6 B. W. C. C. 225, 234.

had no option but to dismiss the workman's application. No doubt if the judge had been bound to find that the man was an "odd lot," different considerations would have applied: *Cardiff Corporation* v. *Hall* (1); but there is no evidence which would have supported such a finding. There is only one reported case in which the Court has differed with a county court judge in holding that a man was not an "odd lot" where the latter has held that he was: *Palmer* v. *Crawshay Brothers, Ld.* (2) As to what constitutes an "odd lot" see the remarks of Scrutton L.J. in *Foster* v. *Wharncliffe Woodmoor Colliery Co.* (3), and also *Gaffney* v. *Chorley Colliery Co.* (4)

The cases relied upon by the other side were all cases in which the workmen were receiving compensation.

In *Bromley* v. *Staveley Coal and Iron Co.* and *Drew* v. *Same* (5) the supervening cause (a strike) took effect when the workmen were not receiving compensation. The employers there gave notice to the men to terminate their contracts, and the Court held that the men were not entitled to receive compensation during the strike.

[LORD HANWORTH M.R. referred to *Hamilton* v. *Shelton Iron, Steel and Coal Co.* (6)]

In *Murray* v. *Portland Colliery Co.* (7) it was proved that it was not by reason of the strike but by reason of the accident that the workman suffered loss of earning capacity. That distinguishes the case from *Bromley's* case. (5) The evidence here was the same as that in *Bromley's* case (5)—namely, that the workman was out of work for economic reasons and not on account of his injury. There was no work for him to do and he could be in no better position than workmen who had not been injured. The present case is therefore on all fours with *Drew's* case (5) and *Bromley's* case. (5) In *Portland Colliery Co.* v. *Murray* (8) there was evidence that

(1) [1911] 1 K. B. 1009; 4 B. W. C. C. 159.
(2) 19 B. W. C. C. 164.
(3) [1922] 2 K. B. 701, 715.
(4) 15 B. W. C. C. 158.
(5) (1923) 16 B. W. C. C. 77.
(6) (1926) 19 B. W. C. C. 475.
(7) (1922) 15 B. W. C. C. 362, 364.
(8) [1923] A. C. 566; 16 B. W. C. C. 116.

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there was work outside the colliery which the workman could have obtained.

Cave K.C. in reply.

[SCRUTTON L.J. I have been rather puzzled to understand what *Cardiff Corporation* v. *Hall* (1) has to do with this case.]

The facts there were very different from those in this case. Here the man is a derelict in the labour market and cannot compete with others in it.

The county court judge here while not using the term "odd lot" has used the word "derelict," and it is submitted there is no difference in their meanings.

The principles which it is submitted are to be deduced from the reported cases are the following :—

1. A workman whose injuries no longer prevent him from earning full wages in the open market cannot have compensation merely because industrial conditions prevent him from obtaining employment.

2. A workman whose injuries no longer prevent him from earning some wages in the open market, but do prevent him from earning his old wages, is not deprived of partial compensation for such loss as he has sustained by his injuries merely because industrial conditions prevent him obtaining any employment.

3. A workman whose injuries prevent him obtaining any employment is not deprived of compensation because industrial conditions also prevent him obtaining employment.

4. A workman, whose injuries are of such a nature that unless his employers find him work he is unemployable, is not deprived of full compensation if his employers do not employ him, merely because industrial conditions would have prevented him from obtaining employment if he had been uninjured.

It is submitted that the appellant comes within the last proposition.

In the various Acts the expression "able to earn" occurs, and the question as to the amount depends on the Act. "Able to earn" means employs his ability to obtain the employment.

(1) [1911] 1 K. B. 1009.

The county court judge must direct himself properly, having regard to the principles laid down in *Hall's* case (1) and other cases.

On the facts, it is submitted, the appellant was wholly incapacitated.

[He also referred to *Kirkby* v. *Howley Park Coal and Cannel Co.* (2)]

Cur. adv. vult.

WATKINS *v.* SAME.

"In *Watkins'* case, the workman, while working in the respondents' steel works, suffered an accident on February 16, 1908, which necessitated the amputation of his right leg at the thigh. He was paid compensation, and on April 28, 1910, an agreement with his employers was reached and recorded, under which he was paid half wages, 16*s.* 1*d.*, as compensation in supplement to the wages which he earned on light work which the respondents gave him. On May 3, 1926, the works at which he was employed were stopped and since then he has been unemployed. The workman shortly afterwards commenced proceedings for a review of the weekly payments made to him. The respondents contested their liability on the ground that 'that the applicant is out of work owing to industrial conditions and that he is in receipt of unemployment benefit,' and claimed that 'the applicant is not incapacitated by reason of his accident from earning wages equal to or in excess of his pre-accident earnings.' The learned judge held that there was no loss then due to the incapacity arising from the accident, and dismissed the application. The Act under which this case and the two following cases are to be determined is the Workmen's Compensation Act, 1906."

Cave K.C. and *A. T. James* for the appellant. In this case of Watkins the learned county court judge has held that since the date of the agreement there has been no change of circumstances. It is submitted, however, that the loss of

(1) [1911] 1 K. B. 1009. (2) (1920) 13 B. W. C. C. 168.

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his employment by the respondents was an ample change of circumstances.

[LORD HANWORTH M.R. As regards Watkins I am bound by my decision in *Hamilton's* case. (1)]

It is clear, it is submitted on the authority of *Macdonald or Duris* v. *Wilsons and Clyde Coal Co.* (2); *M'Alinden* v. *James Nimmo & Co.* (3); and *Hutchison* v. *Cadzow Coal Co.* (4), that the county court judge ought to have held that this loss of employment was a change of circumstances which entitled him to review the agreement.

Wingate-Saul K.C. and *T. W. Langman* for the respondents. The ground on which the review of the agreement was sought was that there was no suitable work available for the workman. The only question before the county court judge was whether the workman was entitled to an increase of compensation, and there was no evidence given on which he could increase it.

Macdonald's case (2) is really a decision in the respondents' favour: see the judgment of Lord Shaw in that case. (5) Where economic causes are the sole cause of reduction there is no right to review: *M'Combe* v. *Bent Colliery Co.* (6)

The respondents' steel works had to close down owing to the coal strike. As was said by Buckley L.J. in *Cardiff Corporation* v. *Hall* (7): "Inability to earn for the purposes of Sch. I., para. 3, is inability to get employment owing to some incapacity for work personal to the workman to the exclusion of inability to get employment owing to the state of the labour market. The employer may be called an insurer of 'capacity to work,' but he is not an insurer of a 'right to work.' The Workmen's Compensation Act is not a Right to Work Act." The county court judge was entitled to take into consideration all the circumstances of which he had personal knowledge. Any change of circumstances that there might have been was a change which was common to the whole coalfield.

(1) 19 B. W. C. C. 475.
(2) [1912] A. C. 513.
(3) [1920] A. C. 39.
(4) (1924) 17 B. W. C. C. 365.
(5) [1912] A. C. 513, 518.
(6) (1924) 17 B. W. C. C. 349, 355.
(7) [1911] 1 K. B. 1009, 1027.

[They also referred to *Cory Brothers & Co.* v. *Hughes.* (1)]

Cave K.C. replied.

Cur. adv. vult.

TUCKER *v.* SAME.

"The workman was a hitcher employed at a mine of the respondents and on August 12, 1913, suffered an accident whereby his hip was injured and rendered rigid. He was in the army for two years and then was given work by the respondents as a signaller in the pit, work which is of the character of a 'compensation job.' On April 30, 1924, the colliery was closed down for economic reasons and so Tucker's employment ended. On September 23, 1924, he took proceedings against the respondents, but abandoned them on work being found for him at a pump at Nantwen. On February 17, 1925, this work came to an end, and Tucker again commenced proceedings. His claim was dismissed, but a declaration of liability was granted him. On November 23, 1925, he commenced the present proceedings, the hearing of which was adjourned for the reason already stated. Ultimately the case was heard and determined on October 20, 1926, when the judge dismissed the application for the reasons given in his judgment of January 19, 1927. The same points were relied upon in this case by the respondents as in the case of Watkins."

Cave K.C. and *A. T. James* for the appellant. This case is entirely covered by the arguments adduced by us in Lewis' case and Watkins' case.

Wingate-Saul K.C. and *T. W. Langman* for the respondents submitted that on the evidence the county court judge was justified in holding that there had been no change of circumstances since the award made by him in June, 1925.

[They referred to *Pope & Pearson, Ld.* v. *Gamble.* (2)]

Cave K.C. replied.

Cur. adv. vult.

(1) [1911] 2 K. B. 738, 743. (2) (1923) 16 B. W. C. C. 157.

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Watkins v. Same.
Tucker v. Same.
Ingram v. Crawshay Bros. (Cyfartha), Ld.

INGRAM *v.* CRAWSHAY BROTHERS (CYFARTHA), LIMITED.

"Ingram was injured by an accident on September 12, 1917, whereby some fingers of his left hand were crushed. Light work was given him until the pit was closed in October, 1924. On June 25, 1925, an agreement was reached at a time when he was out of work under which he was to be paid 4*s.* a week and he has been paid that sum continuously. In May, 1926, he commenced proceedings for review. The case was heard in October and the same judgment dismissing his application was given in this case also."

Cave K.C. and *A. T. James* for the appellant. The change of circumstances relied upon in this case is that the appellant made repeated attempts to obtain employment, but failed to obtain it.

[Lord Hanworth M.R. referred to *Cardiff Corporation* v. *Hall.* (1)]

Wingate-Saul K.C. and *T. W. Langman* for the respondents. It was conceded by counsel for the appellant in this case that there was no alteration in the condition of the workman. There was no evidence here that a single person had refused the appellant work on the ground of his injury. The workman has not therefore discharged the onus which was upon him.

Cave K.C. in reply admitted that the case was not as strong as the other cases.

Cur. adv. vult.

April 6. The following written judgments were delivered :—

Lord Hanworth M.R. These four cases involve a point for decision common to them all, though the facts in each differ in some respects. The learned county court judge delivered a judgment which he intended to be applicable to all of them. The first case, that of Lewis, is a request for an arbitration and award. The three other cases are requests by the workmen for reviews of the agreements recorded or awards made. The county court judge has made

(1) [1911] 1 K. B. 1009, 1027.

a note that it was agreed that, but for industrial or economic conditions which caused the pits to close down, all the workmen would have continued in the work on which they were last employed. The facts of each case may be summarized shortly. [His Lordship stated the facts of the four cases as above set out and continued:] The four cases thus raise the question how far the compensation payable to the workman is affected by economic or industrial conditions and the possibility of the workman obtaining employment under them. The learned judge asks what, if any, compensation ought to be given to Lewis in respect of his injury under the conditions of the labour market that he describes? He adds that in order to answer that question he must deal with the question of rates of compensation at some length. It is, in my judgment, necessary to begin at an earlier stage, and to decide what is the basis and nature of the compensation granted to the workman.

Sect. 1 of the Act of 1897 is as follows: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." The effective words of this section are the same in the Acts of 1906 and 1925. In the Act of 1897 the employments to which it applied were limited by s. 7, and in the subsequent Acts that limitation was abandoned. Upon the happening of an accident, therefore, the employer became liable to pay compensation to the workman to be ascertained at that time, and upon the facts as they then stood, during the incapacity, subject to the right of review expressly given both to employer and workman under the Act. See *Lysons* v. *Andrew Knowles & Sons, Ld.* (1), where Lord Halsbury makes it plain that this right is given by the Act and is not cut down by the Schedule which directs how the quantum payable is to be measured: see also *Woodilee Coal and Coke Co.* v. *M'Neill* (2), per Lord Dunedin. The nature of the compensation given to the workman is

(1) [1901] A. C. 79. (2) (1917) 10 B .W. C. C. 637, 643.

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pointed out clearly by Hamilton L.J. in *Harwood* v. *Wyken Colliery Co.* (1), and contrasted with the damages that are recoverable for injury caused to a plaintiff workman by the tortious negligence of the employer or his servants. "The object of the Act," he says, "is to give an injured workman a livelihood so long as an injury incapacitates him from gaining his living." He points out that the Act makes no reference to the possible supervention of other causes of incapacity. "The Act is a guarantee of workmen against the risk of accident. It is not founded on indemnity, and the ideas of retribution for wrong-doing and of restoratio in integrum are foreign to it." Interpreting the Act upon that principle, the Court of Appeal in that case held that the workman was entitled to his compensation for incapacity arising from a permanent injury to his knee, and not less so because heart disease had supervened which would have made it impossible for him to do his work if his knee had been sound. Buckley L.J. says (2) that the compensation given by the Act is not a compensation for the injury, but a compensation for the consequences resulting from the injury, such consequences disclosing themselves in the form of inability to earn wages due to the injury sustained. This case, binding upon this Court, decides that it would be wrong to read "solely" into the Act: that a supervening physical infirmity does not vary the rights given to the workman under the Act: that the consequences which form the basis of the measurement of the damages are to be found in the inability to earn wages due to the injury sustained: that the date of the application for the compensation is the critical date.

The decision in this case has been followed in a number of others where a supervening cause of incapacity has been disregarded. In *Stowell* v. *Ellerman Lines, Ld.* (3), old age and other supervening causes were held not to disentitle the workman to such an assessment of compensation for incapacity as could be traced and attributed to the accident. Indeed it has been applied to the case of *McNally* v. *Furness*,

(1) [1913] 2 K. B. 158, 170. (2) [1913] 2 K. B. 165.
(3) (1923) 16 B. W. C. C. 46.

Withy & Co. (1), where a workman was imprisoned for theft, and therefore disabled from earning wages while his employers were prevented from giving him light work. This last decision is binding upon this Court; and if it is held to be sound in the House of Lords, it carries the irrelevance of a second cause to the limit that if it is due to the act of the man himself, it ought nevertheless to be disregarded.

I have laid emphasis upon the words of Buckley L.J. quoted above—"inability to earn wages due to the injury sustained"—for they appear to me to be the keynote of the measure of the compensation recoverable. The injury sustained by the accident is what is to be regarded. He had expressed the same view in *Radcliffe* v. *Pacific Steam Navigation Co.* (2), where he said: "Fluctuations in the (labour) market ought not to be taken into consideration," and in *Cardiff Corporation* v. *Hall* (3) his words were: "Inability to earn for the purposes of Sched. I., par. 3, is inability to get employment owing to some incapacity for work personal to the workman to the exclusion of inability to get employment owing to the state of the labour market." Further in *Gaffney* v. *Chorley Colliery Co.* (4) it was decided by this Court that the condition of the labour market was not to be taken as a factor into the problem. Lord Sterndale M.R. said (5): "the judge must be careful to see that any loss of earnings is due to the physical condition of the man, and not to the state of the labour market." Scrutton L.J. said (6): "I think that this case must go back to the judge, not on the footing of total incapacity, but to assess the compensation due by reason of the partial incapacity, the loss of earning capacity. He is not to reckon in this loss of earning capacity loss due to the fall in the labour market, especially as such loss is largely due to the action of the miners themselves in allowing the pits to be flooded."

The rules thus laid down appear to be these: the workman is entitled to compensation if the accident disables him from

(1) [1913] 3 K. B. 605.
(2) [1910] 1 K. B. 685, 694.
(3) [1911] 1 K. B. 1009, 1027.
(4) 15 B. W. C. C. 158.
(5) Ibid. 164.
(6) Ibid. 165.

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earning wages such as he was capable of earning previously to the accident; the compensation is to be measured by the disability that is due to the injury sustained and that compensation is to be turned into a money value according to the state of the normal market at that time, without taking into account abnormal and ephemeral conditions; and particularly the workman ought not to be allowed to rely upon conditions of the labour market which he has contributed to produce, or upon absence of employment due to his own act or the acts of those associated with him and for which he shares responsibility. This latter statement appears justified by *Bromley and Drew* v. *Staveley Coal and Iron Co.* (1) and *Hamilton* v. *Shelton Iron, Steel and Coal Co.* (2) In *Portland Colliery Co.* v. *Murray* (3) Lord Dunedin repeats what had been said in *Harwood* v. *Wyken Colliery Co.* (4), that "the right of compensation rests not on the Schedule, but on the first section of the Act." The Schedule deals with the fixing of the amount of the compensation and provides the limits between which it is to be paid. "It is not a statutory termination or interruption of the state of incapacity. When the words can no longer be applied, then there is no bar to the right which the injured man has to be compensated for partial incapacity." The workman is affirmatively entitled to compensation for partial incapacity as above, and is not deprived of it merely because industrial conditions prevent him from obtaining any employment.

There is another factor to be borne in mind. The measure of the compensation is on a statutory and artificial basis—the state of the labour market is not to be taken into account; but a rise of wages, as in *Woodilee Coal and Coke Co.* v. *M'Neill* (5), or a fall, as in *Merry & Cunninghame, Ld.* v. *Black* (6) and in *Bevan* v. *Energlyn Colliery Co.* (7), is to be taken into account in adjusting the amount between the maxima for the purpose of correcting and adjusting the

(1) 16 B. W. C. C. 77.
(2) 19 B. W. C. C. 475.
(3) [1923] A. C. 566, 575.
(4) [1913] 2 K. B. 158.
(5) [1918] A. C. 43.
(6) (1909) 2 B. W. C. C. 372.
(7) [1912] 1 K. B. 63.

figures apparent at the time the award is made. For under the Act of 1906, Sch. I., para. 3, the words are introduced that the weekly payment is to "bear such relation to the amount of that difference (between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is actually earning) as under the circumstances of the case may appear proper." By this means a discretion is given to the judge to prevent too large or too small a figure being reached owing to a difference—it may be a temporary difference—in the true figures of what the workman "is earning or is able to earn."

The learned judge after taking full time for consideration delivered a careful and thoughtful judgment; but I cannot accept his reasoning or his conclusions. The questions that he propounds appear to me to be contrary to the basic conception of compensation to the workman as laid down in *Harwood* v. *Wyken Colliery Co.* (1); *Ball* v. *William Hunt & Sons* (2); Lord Dunedin's judgment already referred to (3); and in *Portland Colliery Co.* v. *Murray.* (4) His second, or alternative, statement of the question involves holding that the judgments of Moulton and Buckley L.JJ. in *Cardiff Corporation* v. *Hall* (5) were wrong and that the judgment of the Master of the Rolls was right. In his judgment he definitely adopts this view, and says that the true principle of compensation is that the actual loss of wages resulting from the incapacity for work caused by an accident, as distinct from the mere amount of personal or physical incapacity for work resulting from it, is the true criterion for the assessment of compensation. This criterion is in my opinion not right. It is in conflict with the cases already cited. *Cardiff Corporation* v. *Hall* (5) has been accepted as good law and acted upon many times in the Court of Appeal, and was definitely approved by Lords Loreburn and Shaw in *Ball* v. *William Hunt & Sons.* (6) It was followed in this

(1) [1913] 2 K. B. 158.
(2) [1912] A. C. 496.
(3) [1923] A. C. 566, 575.
(4) [1923] A. C. 566.
(5) [1911] 1 K. B. 1009.
(6) [1912] A. C. 496, 500, 509.

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Court in the recent case of *Palmer* v. *Crawshay Brothers, Ld.* (1)—one which is binding upon this Court, and upon the learned judge whose decision is now under review, and not less so because it was his decision that was appealed from in *Palmer* v. *Crawshay Brothers, Ld.* (1) *Cardiff Corporation* v. *Hall* (2) stands as an authority that the compensation which the workman is entitled to is that which is to be apportioned to his injury in a normal market apart from the difficulties superadded by industrial conditions.

The learned judge has been careful to express his finding that none of the workmen was an "odd lot" in the sense that he was to be treated as totally incapacitated unless the employer discharged the onus which in such cases lies upon him of proving that there was work available for the workman which the latter refused to accept and do. Not being "odd lots" and having been employed until their work ceased owing to supervening, that is to say, economic causes, the workmen must be considered as workmen capable of being employed under normal conditions. Indeed of Lewis the learned judge says: "He is now a partially disabled man: he is physically able to do the form of light work he has been doing—a well-known and necessary form of light work at a colliery—and in my opinion he is able to do other forms of light work necessary at a colliery." "Lewis is therefore a class of man who is able to do established forms of light employment, and, under ordinary industrial conditions, has a good market for his labour with his old employers; but under exceptional industrial conditions he is apt to lose this market and to find himself in the position that there is no other market for such established lines of work as he is able to do."

The case of Lewis must go back for reconsideration by the learned judge, who must direct himself in accordance with what was said by the majority of the Court in *Cardiff Corporation* v. *Hall* (2) and the other cases I have referred to. Upon the facts found by him Lewis is entitled to compensation for partial loss of capacity on the basis that

(1) 19 B. W. C. C. 164. (2) [1911] 1 K. B. 1009.

he is still employable even if, at the present time, it is not easy for him to find employment.

The three other cases are applications for review. These applications appear to be not unfounded, for there has been a change of circumstances since the weekly payments were awarded, or agreed to, within the wide interpretation of that phrase now permitted: see *Macdonald* v. *Wilsons and Clyde Coal Co.* (1); and *Ball* v. *William Hunt & Sons* (2); *McAlinden* v. *James Nimmo & Co.* (3) I have some doubt whether there has been a change of circumstances in Ingram's case. But as I disagree with the basis of the learned judge's judgment which embraced all four cases, it will be better that Ingram's case should be reconsidered. It may be that there has not been any change of circumstances entitling Ingram to a review. That is a question of fact for the county court judge. His task in these cases, as in so very many cases under the Workmen's Compensation Act, is not an easy one. But the cases that I have referred to, and particularly *Gaffney* v. *Chorley Colliery Co.* (4) and the *Portland Colliery Co.* v. *Murray* (5), mark out the lines that are to be followed.

The appeals will be allowed in all four cases with costs and the cases remitted to the learned judge for reconsideration.

SCRUTTON L.J. These four cases raise the troublesome question of the amount of compensation to be paid to a man who has been physically injured so as to affect his earning capacity, and is also affected by labour conditions reducing employment which would, apart from any accident, affect his earnings. The county court judge has refused all four applicants any compensation and they appeal.

The cases are not made any easier by the way in which the county court judge has dealt with them. He has given a very long and careful judgment in the case of Lewis and added short passages dealing with the three other cases. But he has treated the case of Lewis entirely under the Act

(1) [1912] A. C. 513.
(2) [1912] A. C. 496.
(3) [1920] A. C. 39; 12 B. W. C. C. 293.
(4) 15 B. W. C. C. 158.
(5) [1923] A. C. 566.

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of 1906 and referred repeatedly to para. 3 of Sch. I. of that Act as justifying his action. He has overlooked the fact that as Lewis's accident happened in 1904, the Act of 1906 does not apply to it at all: see s. 16 of that Act. The Act of 1897 is the relevant one, and Sch. I., para. 2, of that Act is in quite different words from those of para. 3 of Sch. I. of the Act of 1906 and in particular does not contain the words on which he relies in his judgment. These words were probably inserted in 1906 as a result of the judgment in *James* v. *Ocean Coal Co.* (1), and decisions under the Act of 1906 (see especially *Bevan* v. *Energlyn Colliery Co.* (2) and per Lord Dundas in *Woodilee Coal and Coke Co.* v. *M'Neill* (3)) call pointed attention to the change of language. The result is that the whole of the principal judgment is based on the wrong Act. Its main conclusion is that the judgment of the majority of the Court of Appeal in the well known case of *Cardiff Corporation* v. *Hall* (4) decided in 1911, being inconsistent with two decisions of the House of Lords in 1917, *Heathcote* v. *Haunchwood Collieries, Ld.* (5), and *Woodilee Coal and Coke Co.* v. *M'Neill* (6), "is no longer law" and has not been law presumably since 1917. Considering that the majority judgments in the *Cardiff Corporation* case (4) were expressly approved by Lord Loreburn and Lord Shaw in *Ball* v. *William Hunt & Sons* (7) in 1912, that the case was not cited or referred to in the two cases in the House of Lords which are supposed to have made it "no longer law," and that it has been repeatedly followed and acted upon in the Court of Appeal since 1917, it seems to me it is hardly the function of the county court judge, or even of the Court of Appeal, to declare it no longer law. Further, in his exhaustive inquiry into the authority of the *Cardiff Corporation* case (4) and incidentally into the validity of a decision of the Court of Appeal in *Palmer's* case (8) reversing a decision of his own, the county court judge seems to have omitted to

(1) [1904] 2 K. B. 213.
(2) [1912] 1 K. B. 63.
(3) (1917) 10 B. W. C. C. 454, 460.
(4) [1911] 1 K. B. 1009.
(5) [1918] A. C. 52.
(6) [1918] A. C. 43.
(7) [1912] A. C. 496, 500, 509.
(8) 19 B. W. C. C. 164.

consider a very important series of decisions of the Court of Appeal, beginning with *Harwood* v. *Wyken Colliery Co.* (1) and ending with the group of Scotch cases in the House of Lords of which *Portland Colliery Co.* v. *Murray* (2) is the first, in which the effect of independent causes each producing the same result in whole or part is considered, with the result that an incapacity in fact from the accident is not rendered sterile of compensation by the fact that another independent cause would produce the same result. These deficiencies and errors in the judgment below excuse me from criticizing its argument closely and I propose to deal with the matter independently.

The three applications to review must be decided under the Act of 1906; the original application of Lewis under the Act of 1897.

Under either Act it is necessary to appreciate the nature of the "compensation" to be awarded. As pointed out by Hamilton L.J. in *Harwood's* case (3), it is not indemnity, but a kind of conventional insurance. The employer who has to pay the workmen something in respect of accidents for which he, the employer, is not blameable has to pay an amount which does not represent the workman's loss, but only part of it, a part quantified by certain statutory rules subject to some discretion in the arbitrator. The workman has to bear part of his loss himself. If the compensation were indemnity, and there were no statutory rules, and the compensation was to be fixed from time to time, one would expect the assessment to proceed on these lines. An undamaged man can earn, say, 60*s*. a week; this damaged man can by reason of his damage only earn 40*s*. a week, his loss is 20*s*. a week. If conditions improved so that an uninjured man could earn 80*s*. a week, and this damaged man only 50*s*. a week, his loss would be 30*s*. a week. But the Act does not proceed on these lines. Dealing only with partial incapacity, the matter involved in the present four cases, the weekly payment is (1.) not to exceed 50 per cent. of his average weekly earnings

(1) [1913] 2 K. B. 158. (2) [1923] A. C. 566.
(3) [1913] 2 K. B. 158, 170.

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during the twelve months before the accident; (2.) not to exceed 1*l.*, and (3.) not to exceed the difference between (*a*) the amount of the average weekly earnings before the accident and (*b*) the average weekly amount which he is earning or able to earn in some suitable employment after the accident. The result is that however much wages rise he cannot get more than 50 per cent. of his pre-accident wages, and if wages rise so that as a damaged man he is making after the accident as much or more than as an undamaged man he was making before the accident, he can get nothing, although the damage from the accident is preventing him from earning considerable sums. The rise of wages relieves the employer of liability, and the fall of wages similarly may involve him in liability. But the arbitrator while he has regard to these maxima may, under the Act of 1906, within them vary the compensation which "shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." In particular the House of Lords has decided in *Woodilee Coal and Coke Co.* v. *M'Neill* (1) (a case of rise of wages), approving *Bevan* v. *Energlyn Colliery Co.* (2) (a case of fall of wages), that the arbitrator in fixing compensation may have regard to general rise and fall of wages. In *Bevan's* case (2) the man earned before the accident 59*s.*; after the accident only 36*s.*, but if undamaged he would only have earned 40*s.* The judge held he was not entitled to consider the general change of wages, and gave half, 23*s.* (59*s.* minus 36*s.*). The Court of Appeal said he had ignored the direction to give effect to the circumstances of the case, and should have given 2*s.*, being half the difference between undamaged wages, 40*s.*, and damaged wages, 36*s.* Why the half difference was applied to this comparison is not clear except on the view that employer and workman are each to bear half the loss, and 4*s.* was the proved amount of loss attributable to the accident. But the real loss would be the difference between 36*s.* damaged wages and the amount an undamaged man would then earn, though the third maximum prevented the

(1) [1918] A. C. 43. (2) [1912] 1 K. B. 63.

whole of this amount being given. This was approved by the House of Lords in *Woodilee Coal and Coke Co.'s* case. (1) I do not think, however, Cozens-Hardy M.R. is completely accurate when he says (2): "If wages are going up, that is a provision which may tend very much to the benefit of the workman." No doubt he gets more wages than he would otherwise, but he may get less or no compensation if his new damaged wages are raised to the level of his old undamaged wages. In *Woodilee Coal and Coke Co.'s* case (1) the workman's pre-accident wages were 40*s.*; his post-accident wages (damaged) were 27*s.* 6*d.*, but if undamaged wages would be 55*s.* The difference between the actual pre and post-accident wages was 12*s.* 6*d.*, and the arbitrator considering what he had actually lost, the difference between 55*s.* and 27*s.* 6*d.*, gave him the whole statutory difference, 12*s.* 6*d.* This was affirmed by the House of Lords. On these lines the workman in *Bevan's* case (3) should have had 4*s.*, the difference between 36*s.* and 40*s.*, not 2*s.* as awarded. These cases seem to decide that the arbitrator may consider the actual damage to the man by the accident, and award him the amount of the actual damage, so far as he can do so without infringing the statutory maxima. In both these cases the workman was "earning."

Heathcote's case (4), the other case referred to by the county court judge, raised the question of "able to earn." There the workman had earned before the accident 35*s.* a week at the coal face, after the accident he was in fact earning 30*s.* a week as a carter, and the judge made a finding on the meaning of which the whole case turned, that working in a suitable employment as a packer or loader, as he might have done, he would have earned 7*s.* 5*d.* a day, "He can now earn 7*s.* 5*d.* a day." The majority of the Court of Appeal took the view that this was a finding of ability to earn at least 35*s.* a week, and that consequently there was no difference between pre and post-accident wages, and, therefore, no compensation. I understand the House of Lords to have taken the view that

(1) [1918] A. C. 43.
(2) [1912] 1 K. B. 63, 68.
(3) [1912] 1 K. B. 63.
(4) [1918] A. C. 52.

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if this were the true meaning of the finding the majority were right; but to have held that the real finding was that the man could not earn 7*s.* 5*d.* a day and therefore was not "able to earn," in which case I am sure the majority in the Court of Appeal would have decided the other way. I do not understand what this case has to do with the question before us, but I gather that the county court judge has taken the view that these cases enabled him to say, however damaged the man is, and however much his damaged condition would affect his ability to earn wages, as compared with sound men of his class, if some other condition such as labour difficulties or the state of trade would also prevent him from earning wages, he can have no compensation. In other words, though, owing to the accident, he would not be able to earn wages, yet, if another cause also would prevent him from earning wages, he cannot have compensation for his damaged condition and loss of wage-earning condition thereby.

This brings me to the class of cases which the judge below seems not to have considered, the cases where loss of wages would follow from either of two independent causes, of which damage from the accident would be one. The principle is firmly established by the Court of Appeal decisions and can only be altered by the House of Lords. They begin with *Harwood's* case (1), where a workman was permanently incapacitated by an injury to his knee, and after being paid compensation for some time was discovered to be also permanently incapacitated from work by heart disease not due to the accident. The county court judge decided that the employers need pay no compensation and was reversed by the Court of Appeal, who gave the workman full compensation as the accident prevented him from working. Hamilton L.J. puts it on the ground that the Act does not say "results solely from the injury," and it would entitle the workman to compensation if the accident by itself would cause the loss, even though another cause had not had the same result. This case has been followed where the concurrent disability was from old age: *Jamieson* v. *Fife Coal*

(1) [1913] 2 K. B. 158.

Co. (1); *Stowell* v. *Ellerman Lines, Ld.* (2); *Lewis* v. *Wrexham and Acton Collieries, Ld.* (3); and independent affection of the eyes: *Walker* v. *Cadzow Coal Co.* (4) It has also been followed with severe logic, where the workman was interned as an alien: *Cargo Fleet Iron Co.* v. *Funck* (5); and even where he was sent to prison: *McNally's* case. (6) It may be permissible to doubt whether in the latter case the prison might not have been treated as a self-imposed disability, as in the case where a workman unjustifiably refuses to work. A voluntary strike deprives the workman of compensation: *Drew's* case (7); and the same result appears to have followed where, though the man was willing to work, a rule of his trade union prevented him: *Thompson* v. *Richard Johnson & Nephew, Ld.* (8); and *Williams* v. *Oakwood Colliery Co.* (9) These latter cases appear to be decided on the ground that the man could physically do the work and the reason why he did not was not the accident but the action of the trade union. He was "able to earn."

Lastly, in the Scotch cases reported under the heading of *Portland Colliery Co.* v. *Murray* (10) the House of Lords gave the workman compensation to the extent of his physical incapacity, though there was also a heavy fall of wages due to economic causes which had the same result. A similar order was made by the English Court in *Gaffney's* case (11); see also *Bromley's* case. (7) These cases appear to establish that if a physical disability due to the accident would in the absence of any other cause effect a loss of wage-earning capacity the fact that an independent cause would have the same result does not deprive the workman of compensation.

The case of *Cardiff Corporation* v. *Hall* (12) has been obscured by the prominence given in subsequent cases to the remarks about the effect of being an "odd lot" contained therein, which, as the man in that case was held not to be

(1) (1903) 5 F. 958.
(2) 16 B. W. C. C. 46.
(3) (1916) 9 B. W. C. C. 518.
(4) (1925) 18 B. W. C. C. 657, 671.
(5) (1916) 9 B. W. C. C. 318.
(6) [1913] 3 K. B. 605.
(7) 16 B. W. C. C. 77.
(8) [1914] 3 K. B. 694.
(9) (1919) 12 B. W. C. C. 151.
(10) [1923] A. C. 566.
(11) 15 B. W. C. C. 158.
(12) [1911] 1 K. B. 1009.

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an "odd lot," were all obiter dicta. The man was partially incapacitated by an accident and 9*s.* 2*d.* compensation was paid him. The corporation applied to review on the ground that his physical condition had improved. The judge found that it had improved and that he was able to do any kind of light work, and that the improvement was a change of circumstances, and reduced the compensation to 8*s.* The workman proved that he had applied for some kinds of light work and could not get them. On these facts the Court were divided; the Master of the Rolls desiring to give the man compensation for total incapacity because he could not get light work; the other members of the Court holding that he was only entitled to compensation for the partial incapacity due to his injury, and, being fit for all kinds of light work, that if he could not get them the result was due not to his injury but to economic causes. They distinguished the case of a man so injured that he could never get employment in ordinary circumstances, but only "a compensation job" from a compassionate employer, usually the employer liable to pay compensation. They labelled such a man "an odd lot" and said that in such a case if an employer wished to avoid paying for total incapacity he must prove that employment was available.

In the three cases other than that of Lewis the applicant must show a change of circumstances. If there is no change of circumstances in the sense explained by the House of Lords and referred to hereafter, the application is really an appeal from the original award and is therefore unjustified: *Pope & Pearson, Ld.* v. *Gamble.* (1) But the House of Lords has interpreted change of circumstances to include cases where, though there is no change in physical condition, subsequent events have rendered it possible to prove more clearly its effect on earning capacity. In *McAlinden's* case (2) Lord Finlay said: "The amount may be reviewed if there has either been a change of circumstances, or if further events have put a different complexion on the case"; in the case in question if they have shown that the effect of the accident

(1) 16 B. W. C. C. 157. (2) [1920] A. C. 39, 42, 44.

on wage-earning capacity was greater than had been supposed. Lord Shaw: "That there has been more light thrown by the applicant upon the results of his injury and upon the effects on the labour market which the having of such an injury causes to him." So also Lord Wrenbury. In *Macdonald* v. *Wilsons and Clyde Coal Co.* (1) there was no change in the condition of the workman, but his employers were reducing their staff for business reasons, and he could not get other suitable employment, and the House of Lords held, reversing the Court below, that this gave rise to a claim to review. The decisions under the head of *Portland Colliery Co.* v. *Murray* (2) are to the same effect.

These being the principles to be applied, the facts in the three review cases are as follows: Watkins, a craneman in steel works, lost a leg in an accident in February, 1908, and by recorded agreement in 1910 was to be paid 16*s.* 1*d.* compensation. From 1910 to May 3, 1926, he worked at various light work, getting 7*s.* 5*d.* compensation at first, and then nothing, because his wages were greater than his pre-accident wages. On May 3, 1926, his work stopped by reason of the general strike, and he made his application for review while the steel works were stopped owing to the coal strike. He asked for compensation for total incapacity and the application was heard while the coal strike was still in operation, though judgment was given in January, after the strike had ceased. The judge finds he is not an odd lot, that is, he can do any kind of light work, but cannot get any because of the absence of employment. Watkins seems to me to be in the position that he is partially disabled by his accident, and completely prevented from earning by the consequences of the strike on the labour market. On the Court of Appeal decisions it follows that the latter cause does not prevent his obtaining compensation for partial incapacity resulting from the accident, though it does prevent his obtaining compensation for total incapacity, which is not caused by his accident. The case must go back to the judge to assess the compensation due for the partial incapacity due to the

(1) [1912] A. C. 513. (2) [1923] A. C. 566.

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accident, subject to the provisions of the Act as to maxima. The compensation, subject to the maxima prescribed, appears to be the difference between his earning capacity as a sound man, and his earning capacity in some suitable work as a disabled man only capable of light work, but not an odd lot. It cannot be that there was no light work available in South Wales for any injured man. But if the judge should find that at the period at which he is asked to review but for the strike and its effects he would be earning in spite of his injury more than his pre-accident wages, *Drew's* case (1) would prevent him from giving Watkins the compensation to which he was otherwise entitled. It is said that *Drew's* case (1) is overruled by the decision of the House of Lords in the *Portland Colliery* case (2), but it was not cited to the House of Lords, and if it is to be overruled, it cannot meet its fate in this Court.

TUCKER'S CASE. The facts in the judge's note were very obscure, but the parties supplied us with a list of agreed dates. Tucker met with an accident which gave him a stiff hip and a permanent limp. He was at first paid for total incapacity, but then given light work as a signalman apparently at his old wages. The pit, however, closed down on April 30, 1924, but he got pump work at another colliery which ceased in February, 1925. In April, 1925, he commenced proceedings for compensation which were dismissed in June, 1925, with a declaration of liability. In November, 1925, he started further proceedings asking for compensation for total incapacity; these proceedings were reinstated for hearing on June 24, 1926, heard on July 15, and judgment delivered in October, 1926, and written judgment dated January, 1927. It is obvious that during those fourteen months' proceedings the labour circumstances with their effect on wages were changing during the whole time. The judge finds there is no change in Tucker's physical condition since his application was dismissed in June, 1925, and apparently that the strike does not constitute a change in conditions entitling him to review. He finds that Tucker is not an odd lot. This claim

(1) 16 B. W. C. C. 77. (2) [1923] A. C. 566.

seems to be in the same position as Watkins'. I think the House of Lords decisions show that the strike and its effects on labour may be a change of conditions justifying an application for review; and these certainly existed when the application was reinstated in June, 1926; that Tucker is prima facie injured by the accident so that his wage-earning capacity as compared with a sound man is affected, he is not an "odd lot," he is not entitled to compensation for total incapacity which is caused by labour conditions; he is entitled to compensation for partial incapacity, but it may be that apart from the strike and its effects he would be earning more wages than before the accident, and if so would be deprived of compensation under *Drew's* case. (1)

The case must go back to the judge to assess compensation for partial incapacity on these lines, but in view of the obscurity of the facts Tucker's case seems singularly unfitted to be a test case for anything.

INGRAM'S CASE. Ingram's left hand was permanently injured in 1917 so as to injure his grip seriously. He was given light work, apparently at such wages that no compensation was payable. On October 4, 1924, his pit closed down. In May, 1925, he was by agreement to be paid 4*s*. a week. In May, 1926, he applied for a review asking for compensation. The judge finds that as there has been no change in his physical condition since 1925, he is not entitled to a review, the change in labour conditions not being a relevant change of circumstances. I think he is wrong in this and that the conclusion must be the same as in Tucker's case. I do not repeat it.

There remains Lewis's case arising out of an accident in 1904, which the judge has by an oversight treated as depending on the Act of 1906 instead of the Act of 1897. Lewis was paid compensation for partial incapacity under an unrecorded agreement, and did light work at the colliery. When the pit closed in September, 1924, he tried to get work but failed, and in September, 1925, filed an original application for

(1) 16 B. W. C. C. 77

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CRAWSHAY
BROS.
(CYFARTHA),
LD.

Scrutton L.J.

compensation for permanent partial incapacity. The judge in October, 1926, found that Lewis was not an odd lot, but that sound or damaged he could not in the then existing state of the labour market get employment, so that he had suffered no loss by his accident. The judge got this result from the discretionary words in the Act of 1906, and does not explain how his result is consistent with the line of cases of which *Harwood's* case (1) is an example. The discretionary words in the Act of 1906 are absent from the Act of 1897, which by para. 2 of Sch. I. only requires the judge to have regard to the difference between pre and post-accident wages, not making it a maximum. For the reasons stated in the earlier part of this judgment, I think the judge was wrong in thinking that loss of earning power under labour conditions necessarily prescribed recovery for loss of earning power by reason of physical incapacity, and that latter loss of earning power must be assessed by the judge on the same lines as those laid down in the three preceding cases. The judge finds Lewis not to be an odd lot, and I cannot believe that there were in South Wales no men only capable of any kind of light work, but earning wages in that work, from whose earnings a measure of Lewis's loss of capacity due to the accident could be obtained. No doubt the state of facts found by the judge that men, not odd lots, because they are capable of any kind of light work are yet only likely to get work from their old employer because each employer keeps his compensation jobs for his own compensation men, deserves careful consideration and it will be very useful if a superior tribunal considering its own decisions and those of the Court of Appeal can throw any light on the matter. Similarly the practice by which when ordinary labour strikes, the light-job men who used to come out on strike till they found they lost compensation by doing so, changed their course of action, stayed and demanded work with the more readiness that they knew there would be none for them, and then claimed compensation for total incapacity also requires consideration.

(1) [1913] 2 K. B. 158.

In my opinion all the appeals should be allowed with costs and the cases remitted to the judge to assess partial compensation on the lines above laid down.

LORD HANWORTH M.R. Lawrence L.J. has had the opportunity of reading both these judgments and desires me to say that he agrees with them. The appeals, therefore, will be allowed with costs and the cases remitted for consideration by the learned judge, as indicated by Scrutton L.J.

Appeals allowed.

Lewis's case :—

Solicitors for appellant: *Warren & Warren, for Edward Roberts, Dowlais.*

Solicitors for respondents: *Watson, Sons & Room, for Phœnix & Levinson, Cardiff.*

Watkins' case :—

Solicitor for appellant: *A. Russell Jones.*

Solicitors for respondents: *Peacock & Goddard, for D. W. Jones & Co., Merthyr Tydfil.*

Tucker's case and *Ingram's* case :—

Solicitors for appellants: *Warren & Warren, for Edward Roberts, Dowlais.*

Solicitors for respondents: *Peacock & Goddard, for D. W. Jones & Co., Merthyr Tydfil.*

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April 8.

B. LIGGETT (LIVERPOOL), LIMITED *v.* BARCLAYS BANK, LIMITED.

Banker—Negligence—Cheques of Company to be signed by two Directors—Payment by Banker of Cheques signed by one Director—Cheques payable to Trade Creditors of Company—Liabilities of Company not increased by Payments—Banker entitled to stand in Place of Creditors.

The defendants negligently and contrary to instructions paid cheques of their customers, the plaintiff company, which had been signed by one director only. The cheques were drawn in favour of trade creditors of the company in payment for goods supplied to the company in their business. In an action by the company for money had and received :—

Held, that as the liabilities of the company had not been increased by reason of the payment of the cheques, the defendants were protected from liability on equitable grounds, and were entitled to stand in the place of the creditors whom they had paid.

Where bankers have been put upon inquiry with regard to the appointment of a new director of a company, and are guilty of negligence in not investigating the position, they are not entitled to assume that a notice of appointment of an additional director is a valid notice, and that the director was duly appointed.

FURTHER consideration of an action tried at Liverpool Assizes before Wright J. and a special jury.

The following statement of the facts is taken from the judgment of the learned judge :—

The action was brought by B. Liggett (Liverpool), Ld., against Barclays Bank. It is a company which was registered on October 4, 1923, and which was formed to carry on the business of retail provision merchants in Liverpool. The business had been carried on by Mr. B. Liggett as his own business, but a Mr. Melia had bought a half share in the business for 5000*l.* in cash and thereupon a company was formed, and according to the articles of association of the company there were to be not less than two nor more than three directors. The first directors were to be George Frederick Benjamin Liggett and Edward Melia, and the directors were to have power at any time to appoint any other qualified person to be a director of the company either to fill a casual vacancy or as an addition to the board. The qualification for each director was to be a holding of not

less than 500*l.* nominal value of shares. That qualification was to be acquired within one month of the appointment of a director, and it was provided that the quorum of directors for transacting business should, unless otherwise fixed by the directors, be two. These are the provisions of arts. 23 to 28, which are material for the purposes of this case.

The company, according to the evidence heard at Liverpool, was not solvent when it was registered and was at no subsequent period solvent. Mr. Melia was appointed a director, and was also secretary, Mr. G. F. B. Liggett being not only a director but chairman. Mr. Melia, so far from taking any active part in the conduct of the business from 1924, does not seem to have concerned himself in the management of the affairs of the company; what, however, he did was to keep the control of the company's banking account. When the company was formed Messrs. Barclays Bank, Ld., were appointed as their bankers and were instructed to honour cheques or bills provided they were signed by any two directors for the time being. These instructions of the directors were dated October 19, 1923. They were signed on behalf of B. Liggett (Liverpool), Ld., by Mr. Liggett and Mr. Melia, and specimen signatures of those two gentlemen were appended to those instructions. The branch of the defendant bank at which the company's account was opened was at Walton Road, Liverpool. With the appointment and the instructions there were enclosed the certificate of the incorporation of the company for inspection by the bank manager and a copy of the memorandum and articles of association. Mr. Jones, the bank manager, read those documents. Mr. Melia, while leaving the conduct of the business to Mr. Liggett, kept control over the banking account. His signature was necessary to any cheque before the bank would honour it. In the course of 1925 he became doubtful about the way the business was being carried on and consulted his solicitor and an accountant; and he already had reason to think that demands were being made to induce the bank to pay out moneys on cheques without his signature. For that reason about July 19, 1925,

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he interviewed the bank manager. According to his evidence he told the bank manager that he was having trouble with his fellow director, who was not doing his duty, but what he did insist upon and made clear to the bank manager was that no cheques were to be paid unless they bore, not only the signature of Mr. Liggett, but also his own. By a letter which is undated, but which is said to be in fact July 20, 1925, he reiterated those instructions. The letter is in these terms, addressed to Mr. Jones, Barclays Bank, Walton Road, Liverpool, and signed by Mr. Melia: "By way of confirming our interview I would state that I wish no cheques to be paid out of the above account unless duly signed by Mr. Liggett and myself, as called for in the original authority." He was occasionally absent from Liverpool, but either at that date or possibly at some earlier date he gave to the bank manager his address and his telephone number in Liverpool, so that if any question arose about the payment of cheques he could at once be communicated with, and that was entered in the bank ledger where the company's account was entered up. From time to time cheques were drawn and issued by Mr. Liggett signed only by himself, and about the time which I am now dealing with, the end of July or August, it was arranged that if these cheques were presented they should not be paid until Mr. Melia had been communicated with, and had been consulted about them, and on a number of occasions about the end of July Mr. Melia did attend at the bank, having been notified by telephone, and there affixed his signature to cheques which had come in with only one signature attached, and those cheques were thereupon met. The last occasion, according to Mr. Melia, when he followed that course was August 27 or 28. Mr. Melia at that date had just come back from Ireland, and on August 27 and the first days in September he was at his Liverpool address. Mr. Jones, the bank manager, went away on his holiday in the early part of August and was absent on holiday until September 9. During his absence the affairs at the bank were in charge of the assistant, a Mr. Hicks, who, according to his evidence, was fully

conversant with the arrangement which had been made with Mr. Melia. According to Mr. Hicks's evidence, about the end of August Mr. Liggett came down and saw him and said that Mr. Melia had gone to Ireland, that he had trade cheques which had to be met, and he said: "Meet them, and I will get Mr. Melia to sign them." Mr. Hicks said: "I will pay them and I will get the duplicates properly signed for the other cheques," that is to say, cheques not properly signed and which had come back through the Clearing House. In fact that course was adopted as regards three cheques respectively dated August 20, 25 and 25, 1925. These amount in all to a sum of 661*l.* 12*s.* 9*d.*, and they were paid on August 27 and 28. Mr. Melia, having come down, signed the cheques; these three cheques formed the first item claimed in the action, and that part of the claim has been withdrawn and I need say no more about it. In addition to that, certain cheques were paid by the bank with only one signature. They are three cheques, two dated August 25, 1925, and one dated August 26, 1925, amounting in all to a sum of 470*l.* These were paid on August 27, 28 and 31, and were paid on one signature alone. Mr. Hicks had been asked that this should be done, and he was willing to do it apparently because Mr. Liggett had pointed out to him a difficulty that would arise if trade cheques were not honoured, and had said that he would be obliged by Mr. Hicks obtaining the second signature later, which at that time Mr. Hicks must have thought was the signature of Mr. Melia. On September 1 Mr. Hicks received at the bank a notice. It is written on the plaintiff company's paper dated September 1, 1925, addressed to the manager of Barclays Bank at Walton Road, Liverpool, and signed per pro B. Liggett (Liverpool), Ld., (signed) B. Liggett, chairman, and is in these terms: "I have to inform you that (Mrs.) Eleanor May Liggett has been appointed an additional director of the above company and we accordingly enclose herewith the new director's specimen signature. The instructions with reference to the regulation of the bank account will remain the same as hitherto—viz., 'That cheques should be

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signed by any two directors for the time being.'" The notice was sent without the knowledge or authority of Mr. Melia. It was received by Mr. Hicks, and without any further inquiry he accepted it as a binding notice and acted upon it. He said he looked up the articles of association and then thought it covered all that was necessary. The article required not less than two nor more than three directors, and he said that he presumed the new director had been appointed by the chairman. It did not occur to him to ask whether a quorum was present, and he thought that Mr. Melia was in Ireland and was in Ireland at the time he paid the three cheques which I have just referred to as having been paid on one signature. That being the position, Mr. Hicks went on honouring cheques, and when the manager returned he followed the same practice and cheques were honoured from time to time bearing the signature of Mr. Liggett and Mrs. Liggett. No inquiry was made of Mr. Melia; he was not told what the bank were doing or that they were deviating from the practice which he had established—namely, that, no cheques should be paid if they came in with one signature, and if they came in he should be communicated with and his signature obtained before the cheques were met. Cheques were accordingly paid with these signatures between the period of August 27, and, practically speaking (except two small cheques which were paid in October), till the end of September. At the end of September Mr. Melia's accountant came to the bank and said that he had ascertained that cheques were being paid on the signatures of Mr. and Mrs. Liggett, and pointed out that that was entirely improper; and thereupon, except in a few isolated instances of two small cheques which had been drawn in September and which apparently were not presented until the end of October, the bank made no further payments. In addition to the cheques dealt with in this way there was a bill accepted by Mr. and Mrs. Liggett which was drawn on September 12, 1925, and was paid on September 15. Two bills were paid in August, one on August 14 and the other on August 21, on the signature of George Frederick Benjamin Liggett alone.

It is admitted by the defendants in this action that they are liable in any case upon those bills, and they have paid into Court without a denial of liability the amount of those two bills, which is 106*l.* 5*s.* 7*d.*

Greaves-Lord K.C. and *N. B. Goldie* for the plaintiffs. In view of the jury's finding that the defendants were put on inquiry as to the appointment of Mrs. Liggett as director, they cannot escape liability on the ground that they were entitled to assume that the notice given to them by Mr. Liggett on September 1, 1925, was in order. They wrongfully debited the plaintiffs' account with the amounts of the cheques signed by Mr. and Mrs. Liggett, and they are, therefore, liable to the plaintiffs to the extent of those sums in an action for money had and received.

[They referred to *A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins.* (1)]

Singleton K.C. and *Wooll* for the defendants. There was no evidence to support the finding of the jury that the defendants were put on inquiry whether Mrs. Liggett's appointment was in order. The question of her appointment was one purely of the internal management of the plaintiff company, and the defendants were, therefore, not bound to inquire into it, but were entitled to assume that everything was regular: per Scrutton L.J. in *Kreditbank Cassel* v. *Schenkers, Ld.* (2) The defendants were dealing with a matter involving a director in which a director normally would have power to act for the plaintiff company, and they were not obliged to inquire whether or not the formalities required by the articles of association before the director could exercise that power had been complied with: per Atkin L.J. in *Kreditbank Cassel* v. *Schenkers, Ld.* (3); see also per Sargant L.J. in *Houghton & Co.* v. *Nothard, Lowe & Wills, Ld.* (4); per Astbury J. in *In re Fireproof Doors, Ld.* (5); per Lord Halsbury in *County of Gloucester*

(1) [1924] 1 K. B. 775.
(2) [1927] 1 K. B. 826; 43 Times L. R. 237, 241.
(3) [1927] 1 K. B. 826; 43 Times L. R. 237, 243.
(4) [1927] 1 K. B. 246, 266.
(5) [1916] 2 Ch. 142, 150.

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Bank v. *Rudry Merthyr Steam and House Coal Colliery Co.* (1); *Mahony* v. *East Holyford Mining Co.* (2)

With regard to damages, the transaction here is equivalent to an advance by the defendants to pay the plaintiffs' creditors. The plaintiffs have had the full benefit of that advance, and they cannot, therefore, recover from the defendants the amount of the cheques in question: per Scrutton L.J. in *A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins* (3); *Bannatyne* v. *MacIver* (4); *Reid* v. *Rigby & Co.* (5); *Baroness Wenlock and Others* v. *River Dee Co.* (6) The test is whether the transaction complained of by the plaintiffs has really added to their liabilities; per Lord Selborne L.C. in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (7)

Greaves-Lord K.C. in reply. The plaintiffs are entitled to recover the amount of the cheques. The voluntary payment by one person of another's debts does not entitle the former to recover from the latter the amount so paid. The basis of the decisions in *Bannatyne* v. *MacIver* (4) and *Reid* v. *Rigby & Co.* (5) was that the money had found its way into the coffers of the defendants and had been used by them. *A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins* (8) was an action for conversion, and the sole question considered by Scrutton L.J. in the passages cited was the mitigation of the damages in such an action by redelivery. In *Exall* v. *Partridge* (9) Lord Kenyon C.J. demurred to the proposition that where one person benefited by the payment of money by a stranger the law raised an assumpsit against him. The defendants cashed cheques drawn on the plaintiffs' account which they had no authority to cash, and the plaintiffs are, therefore, entitled to recover: *Kepitigalla Rubber Estates, Ld.* v. *National Bank of India, Ld.* (10)

(1) [1895] 1 Ch. 629, 633.
(2) (1875) L. R. 7 H. L. 869.
(3) [1924] 1 K. B. 775, 794.
(4) [1906] 1 K. B. 103.
(5) [1894] 2 Q. B. 40.
(6) (1887) 19 Q. B. D. 155.
(7) (1882) 22 Ch. D. 61, 71.
(8) [1924] 1 K. B. 775.
(9) (1799) 8 T. R. 308.
(10) [1909] 2 K. B. 1010.

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WRIGHT J. [after stating the facts continued :] The question which arises in this action is with reference to all the cheques paid on the signature of George Frederick Benjamin Liggett and Eleanor May Liggett. These cheques, which are considerable in number, amount in all to 5981*l.* 2*s.* 1*d.* As regards the first three cheques, they were drawn on August 25 and 26, and they were paid, one on August 27, one on August 28, and one on August 31, and when they were paid they bore no signature but that of Mr. Liggett. I do not see how the bank can justify the payment of those cheques, because they were clearly paid without any authority or any pretence of authority. As regards the three cheques, the further event which happened was obviously most irregular, because when Mrs. Liggett came to the bank on September 2, Mr. Hicks, who was in charge of the bank, obtained her signature to those three cheques. They had been both drawn and paid before there had even been a semblance of an appointment of her as director. In addition to those cheques there was another cheque drawn on August 29, and certain others, seven in number, drawn on August 31, 1925. These were paid, one on September 2, and the others at various dates between September 4 and 9, and in each case either before they were paid or immediately after they were paid, having been originally signed only by George Frederick Benjamin Liggett, the signature of Mrs. Liggett was obtained to those ; and the bank thereupon treated them as being in order ; in other words, Mrs. Liggett signed cheques, or purported to sign cheques, as director which were drawn at a date before she was appointed a director. The remaining cheques were dated on various dates from September 1 to 30, and they all bore the signature of Mr. and Mrs. Liggett.

The plaintiffs claim as for money had and received that they are entitled to have repaid to them the amount of those cheques on the ground that the defendant bank had no authority to pay the cheques. That is the issue. The primary defence set up by the defendant bank is one based upon an application of the well known rule which is often

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referred to as the rule in the *Royal British Bank* v. *Turquand* (1), a rule which has been applied in a great many cases to which I have been referred, for instance in *Mahony* v. *East Holyford Mining Co.* (2); *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (3); and quite recently discussed in *Houghton & Co.* v. *Nothard, Lowe and Wills, Ld.* (4), and even more recently in *Kreditbank Cassel* v. *Schenkers, Ld.* (5) The rule as relied on by the defendant bank is that the defendant bank having had the articles of association were entitled to assume that the notice of September 1, 1925, sent to them by the chairman was a valid and proper notice, because according to the articles of association it was possible if the proper steps in the matter of internal management had been taken by the directors of the company that Mrs. Liggett should have been duly appointed an additional director, as the notice stated. I am relieved from any examination of the exact definition of this very respectable but perhaps somewhat ambiguous rule of law, because the plaintiff company in answer to that contention have alleged that the defendant bank in any case is not entitled to the benefit of that rule by reason of the fact that the defendant bank were put on inquiry by the circumstances of the case and were negligent in not investigating the position before they accepted and acted upon the notice of the appointment of a new director. On that issue I put two questions to the jury, and the questions were these: "Was the bank put on inquiry whether the appointment of Mrs. Liggett was in order?" The jury answered: "Yes." "Secondly, whether the bank was guilty of negligence in paying the bills and cheques complained of?" and again the jury answered "Yes." Whatever may be the exact scope of the rule in *Turquand's* case (1) I think it is quite clear on principle and on the authorities I have already referred to that it can never be relied upon by a person who is put on inquiry. The

(1) (1856) 6 E. & B. 327.
(2) L. R. 7 H. L. 869.
(3) [1895] 1 Ch. 629.
(4) [1927] 1 K. B. 246.
(5) [1927] 1 K. B. 826; 43 Times L. R. 237.

rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar that person from relying on the prima facie presumption, then it is clear, I think, that he cannot claim the benefit of the rule; and if, therefore, the answers of the jury to the questions which I put to them stand, it is clear, I think, that this defence will not avail the defendants here.

Mr. Singleton has submitted that there was no evidence upon which the jury could give the answers which they did give. He also submitted when the plaintiffs' case ended that there was no evidence to go to the jury at this stage and that I ought to have withdrawn the case from the jury. I did not think so, nor do I think that the contention is sound that there was no evidence to go to the jury on the questions which I asked them. I should even go further. If I had been trying the case without a jury I should myself have come to exactly the same conclusion as that which the jury arrived at. The substantial ground on which the jury must have held, and I think have properly held, that the defendant bank was put on inquiry, was this: that Mr. Melia was known to them to be a shareholder and a director of the company and was known to be very anxious that no cheques should be paid without his signature. He had given special directions to that effect and had taken steps to ensure that his signature should be obtained, if it was not originally on cheques, by arranging that the bank could communicate with him. I think under those circumstances the defendant bank ought, before they acted upon an instruction such as that contained in the letter of September 1, 1925, to have communicated with Mr. Melia and ascertained if his concurrence had been obtained to the change, because he had been at the bank as recently as August 26 or 27, and this notice was only dated September 1, and, indeed, it was sent at a time when it was thought Mr. Melia was actually in Ireland. The point to which the attention of the jury was directed was this, that

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the defendant bank ought to have taken steps to ascertain whether Mr. Melia was concurring in the appointment of a new director. Whether that concurrence was given by his voting for the appointment with the other director, Mr. Liggett, or whether it was given in the more indirect way first by his voting that the quorum of directors should be one instead of two and thereby vesting the power in Mr. Liggett was a matter of minor importance for practical purposes, because if the change was going to be made it could only be made in either way by the concurrence of Mr. Liggett and Mr. Melia. Indeed, I have very grave doubt whether a new director could be appointed without the direct concurrence of both the existing directors. However that may be, the jury had all the circumstances before them, and they came, as I think, to a clear and proper conclusion, and I entirely dissent from the argument that there was no evidence on which they could come to the conclusion which they formed. That being the position, I think the defence based upon the rule to which I have referred fails, and if the matter stopped there, there would be judgment for the plaintiffs for the whole amount claimed.

But a further and somewhat difficult point is then raised by the defendant bank, and that point I have now to decide. The various cheques and the bills were originally all drawn in favour of ordinary trade creditors of the plaintiff company, and the proceeds of those cheques were all applied to the payment for goods supplied to the company. The position was, as from the end of August, 1925, that Mr. Melia withdrew completely from any active part in the management of the business. He had already withdrawn substantially, but his final withdrawal took this form: that he told Mr. Liggett that he would not sign any more cheques. He seemed to have thought that that would put a stop to the conduct of the business altogether. The business was insolvent from the outset, and Mr. Melia and his advisers were anxious, if possible, to close it down. They might, however, have taken a much more definite step for that purpose. In particular Mr. Melia received on the morning of September 1 a notice

that a directors' meeting of the plaintiff company was to be held at 10 o'clock on the morning of the 4th, and on the agenda one of the matters mentioned was the appointment of an additional director. Mr. Melia had been advised by his solicitor that it was unnecessary for him to take any action on that notice, obviously on the view that as there were only two directors and a quorum was two, unless otherwise ordered by the directors, it could not be done with Mr. Melia's concurrence, as after he had absented himself nothing could be done in his absence; technically that was very sound advice. He took no notice of the meeting, and, indeed, he apparently took no further action or cognizance of what was being done. Mr. Liggett, however, who had conducted the business up to that time, continued to do so. He continued to order goods for the purposes of the business, which was a retail provision business, and those goods were delivered, and had to be paid for, and they were in fact paid for from time to time by the cheques in question and the bills in question, which accordingly discharged a legal liability incurred by the company, because the people who supplied the goods had no notice that the position had in any way been changed. Mr. Liggett was conducting the business, and not only was the company liable, but the company received the goods which were paid for and which were supplied to them for the purposes of the business. Under those circumstances it is contended by the defendant bank that they are entitled to credit for the amounts so paid—that is to say, for all those cheques—in discharging the debts of the company, and they rely upon the equitable doctrine under which a person who has in fact paid the debts of another without authority is allowed to take advantage of his payment. I take the statement of that equitable doctrine in these terms from the language of Scrutton L.J. in the case of *A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins.* (1) The question which has been debated, and which is not at all an easy question, is whether on the facts of this case that equity applies. It was said by Sir Walter

(1) [1924] 1 K. B. 775.

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Greaves-Lord and Mr. Goldie that in law the position here would simply be this, that the bank for this purpose is in the position of a stranger who without the authority of the plaintiff company has paid off the debts of the plaintiff company, and that being so, the payment was a purely voluntary payment so far as the company was concerned, and hence the company, even if it took the benefit, could not be in any way made responsible for the payments so made. For that rule of common law, a rule of common law which cannot be questioned, reliance is placed, amongst others, on the authority of *Exall* v. *Partridge*. (1) But the matter must now be decided in a Court which takes cognizance of principles of both law and equity, and the question is whether the equitable principle does apply to the facts of this case. The equitable principle has been applied beyond question over and over again to cases where an agent not having the authority of his principal has borrowed money as on behalf of his principal. Under those circumstances at common law the principal cannot be sued and cannot be made to repay the amount so borrowed, but in equity it has been held that to the extent that the amount so borrowed has been applied in payment of the debts of the principal, the quasi lender is entitled to recover from the quasi borrower. The rule is very clearly stated by Lord Selborne in the case of *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (2) The noble and learned Lord said: "And I think the consistency of the equity allowed in the *Cork and Youghal Ry. Co.'s* case (3) with the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders, may be shown in this way. The test is: has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is

(1) 8 T. R. 308. (2) 22 Ch. D. 61, 71.
(3) (1869) L. R. 4 Ch. 748.

consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity; and if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing." That principle is well established in respect of borrowings made without authority, and I may refer to the cases of the *Baroness Wenlock* v. *River Dee Co.* (1) and *Bannatyne* v. *MacIver* (2), in which latter case the principle was applied to a case where the agent who had purported to borrow without authority was the agent, not of the company, but of a private individual. The ground is sometimes put in this way, that the lender or the quasi lender is subrogated to the rights of the creditor who has been paid off. That, obviously, is not precisely true, because no question of subrogation to securities can arise in such a case. The principle has also been applied in *Reversion Fund and Insurance Co.* v. *Maison Cosway, Ld.* (3), to the case where the plaintiff, the quasi lending company, actually knew that the quasi borrowing company had no authority to borrow. If this were a case in which the plaintiffs' account was in debit throughout to the defendant bank, then each of the cheques in question when presented would constitute a request for a loan, and the payment of that cheque would constitute the granting of that loan, and as the cheque and the request were unauthorized the case would be precisely within those authorities I have just referred to. There was some evidence in this case that at the relevant dates the position of the plaintiff company's account at the defendant bank was that it was in debit and that there was an overdraft; to the extent that that is so, the position will be, in my

(1) 19 Q. B. D. 155. (2) [1906] 1 K. B. 103.
(3) [1913] 1 K. B. 364.

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judgment, exactly as in the cases I have referred to, and the position will be precisely covered by the authority of those cases. But it is not clear that that was so throughout or, indeed, at all. I have to consider, therefore, what the position would be if when each one of those cheques or any one of these cheques was presented the account was in credit. The position then would be that in paying one of those cheques without authority the defendant bank was taking money which belonged to its customer and paying that away without authority. In other words, the defendant bank would be in possession of a credit balance belonging to the customer, and without the customer's authority it would be misapplying that credit balance. Does the equity which I have referred to extend to a case of that character? There is only one authority which I have been referred to, and I know of no other, which seems to throw light on this question, and that is *Underwood, Ld.* v. *Bank of Liverpool and Martins.* (1) The claim by the plaintiff company there was for conversion of cheques. The plaintiff company was a one-man company, and the one man, the sole director, indorsed certain of the company's cheques and then paid them to his own account with the defendant bank. The learned judge and the Court of Appeal held that that constituted a conversion, because they were not entitled to collect the proceeds of those cheques and to appropriate the proceeds to the personal account of the sole director, and that being so they were misapplying the property of the plaintiff and were liable for conversion. But it was either shown or indicated with sufficient clearness to justify an inquiry that the proceeds or some of the proceeds of those cheques were used to discharge the liabilities of the company, and the Court of Appeal ordered an inquiry to ascertain if that was so. The Court of Appeal did not expressly say what would be the position if that were so; but as I read their judgment they were disposed to the opinion that in such a case the equity, which I have already referred to as well established as between quasi lenders and quasi borrowers,

(1) [1924] 1 K. B. 775, 794.

would apply. Scrutton L.J. states the position in this way: "But I am not sure that the learned judge had in his mind the equitable doctrines under which a person who had in fact paid the debts of another without authority was allowed the advantage of his payments," and he refers to *Bannatyne* v. *MacIver* (1) and *Reid* v. *Rigby & Co.* (2) That statement of the equity is, I think, wide enough to cover the question which I have to decide in this case, and although there is a technical difference between a claim in conversion and a claim for money had and received such as I have to deal with in the present action, I do not think that that distinction is of such a nature as to prevent the application in the case before me of the same principles as would apply if the claim had been a claim in conversion. The relationship of a banker and customer is that of debtor and creditor; that is, when the customer's account is in credit the banker is the debtor of the customer and, therefore, it is only by a figure of speech that the banker misapplies money of his customer which he had in his possession. That statement would be perfectly true if what the banker had in his possession was a bag of coins or a bundle of notes, and if acting upon an authority which was invalid the banker quite honestly although erroneously took a number of coins out of a bag or a number of notes out of a bundle and paid them on the faith of such an authority he would be guilty of conversion and, if I understand the judgment of the Court of Appeal in this case, in that event the banker would be entitled to the benefit of the equity. If that be so, and in principle it seems to me that ought to be so, I cannot see why the same result should not apply in a case like the one before me, where the banker does not handle actual cash or notes, chattels capable of conversion, but by reason of the present system of banking facilities everything is done by way of credit or debit balances. In such a case there is obviously no conversion, but there is misapplication, under an honest mistake as to the validity of the authority, of the credits which constitute the medium

(1) [1906] 1 K. B. 103. (2) [1894] 2 Q. B. 40.

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of exchange in place of cash. Under these circumstances I think that the equity I have been referred to ought to be extended even in the case where the cheque which was paid was paid out of the credit balance, and was not paid by way of overdraft, so that the banker will be entitled to the benefit of that payment if he can show that that payment went to discharge a legal liability of the customer. The customer in such a case is really no worse off, because the legal liability which has to be discharged is discharged, though it is discharged under circumstances which at common law would not entitle the bank to debit the customer.

The result is that I must order an inquiry, because I have not the facts before me sufficiently to come to a conclusion whether the rule of equity which I have stated does apply, and if so to what extent. The inquiry I order will be addressed to some referee who will report to me. I shall retain seisin of the case and shall deal with all questions of costs and make such final order as the report which follows on the inquiry may seem to require. The inquiry will be as to the exact circumstances under which each one of the cheques and bills complained of was paid, that is to say, what was the state of the plaintiff company's account with the defendant bank at the date of each payment? Was it made in respect of goods supplied and was it made in the ordinary course of business?

Inquiry ordered.

Solicitor for plaintiffs: *G. H. Brabner, Liverpool.*
Solicitors for defendants: *Rutherford & Co., Liverpool.*

F. C.

THE KING *v.* SOUTHWARK GUARDIANS' VACCINATION OFFICERS.

1927
May 2.

Ex parte GOVERNORS OF PEABODY DONATION FUND.

Vaccination—Certificates—Register—Right of Search—Refusal—Mandamus—Vaccination Act, 1867 (30 & 31 *Vict. c.* 84), *ss.* 18, 20, 21, 23, 24—*Vaccination Act*, 1871 (34 & 35 *Vict. c.* 98), *ss.* 6, 7—*Vaccination Act*, 1898 (61 & 62 *Vict. c.* 49), *s.* 2—*Vaccination Act*, 1907 (7 *Edw.* 7, *c.* 31), *s.* 1—*Vaccination Order*, 1898, *Fifth Schedule, Form L.*

Sect. 24 of the Vaccination Act, 1867, in providing that the vaccination register therein mentioned shall be kept and that searches may be made therein, has not been impliedly repealed by any of the provisions of the subsequent Vaccination Acts.

ORDER NISI for a mandamus.

The Peabody Donation Fund, a body incorporated by royal charter in 1900, owned and let working class dwellings in the borough of Southwark and elsewhere in London.

The governors of the fund in the exercise of their powers made it a term of the tenancy of each dwelling let by them that every member of the tenant's family should be vaccinated.

On December 2, 1926, two officials of the said governors, in order to ascertain whether that term was being complied with, interviewed at different times one of the vaccination officers of the guardians of the Southwark Union and the clerk to the said guardians, and requested to be allowed to search the vaccination register for the purpose of verifying three names, but they were not allowed to do so.

The governors thereupon applied for and obtained an order nisi to the vaccination officer or officers of the said guardians to show cause why a writ of mandamus should not be issued directed to them commanding them to allow search to be made of the vaccination register, which was kept by their clerk or registrar under the provisions of the Vaccination Act, 1867, s. 24, on the grounds that by s. 24 of that Act and s. 6 of the Vaccination Act, 1871, the said governors

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were entitled to search the register kept by the vaccination officer or officers of the Southwark Union.

Affidavits setting forth the above mentioned facts were filed on behalf of the governors in support of the application.

An affidavit in answer by the clerk to the guardians stated that he had acted upon the instructions of the guardians in declining to produce the vaccination register; that the guardians submitted that the said governors were not entitled to inspect the register under s. 24 of the Act of 1867; that vaccination registers were now kept by the vaccination officers under the provisions of the Vaccination Acts and the Vaccination Order, 1898; that from the Acts and the Order it appeared that the vaccination register as now kept was not the register of vaccination contemplated by or referred to in s. 24 of the Act of 1867; that Form L in the Vaccination Order, 1898, contained information entirely beyond the scope of the information required to be registered under s. 24 of the Act of 1867; that, further, the question of the right of the said governors to inspect the vaccination register for this purpose was the subject of controversy on an occasion in 1913, when, in regard to a tenant of the governors who had made a statutory declaration under the Vaccination Act, 1907, of conscientious objection to the vaccination of his child, it appeared that the then vaccination officer furnished the governors with certain information, that the tenant was then served with notice to quit, that the tenant complained to the Local Government Board, and that the Board took the view that the vaccination officer had exceeded his duties in giving such information; that, acting on the view taken by the Local Government Board that the said governors had not the right for which they contended, and on their own view that it was not right to allow the register to be searched on behalf of the governors for no public purpose but for the purpose of enabling the governors to bring pressure on their tenants, the guardians had refused the request of the governors in the present instance; that the guardians accepted responsibility for the acts of the vaccination officer, who had acted under their instructions; and that it was

the desire of the guardians that the law should be properly carried out.

Wingate-Saul K.C. and *Morle* for the guardians showed cause. The order nisi for a mandamus to the guardians to allow the applicants to search the vaccination register should be discharged.

The applicants are not entitled to search the register. It is true that s. 24 of the Vaccination Act, 1867, provided that the registrar should keep the register therein mentioned and should allow searches to be made therein. That section, however, though not expressly repealed, has been impliedly repealed by the subsequent Vaccination Acts, and, therefore, neither the particular register which it constituted nor the right of search which it conferred can be regarded as now existing. That the section has been impliedly repealed by the later Acts may be shown by a brief review of the relevant sections of the Acts. The Vaccination Act, 1867, provides (s. 14) that the registrar-general should provide appropriate books, forms and regulations for the use of the registrars in the exercise of their duties therein prescribed; (s. 18) that if any public vaccinator or medical practitioner shall be of opinion that the child is not in a fit state to be successfully vaccinated he shall deliver to the parent or other person having the custody of the child a certificate of unfitness for successful vaccination to remain in force as therein mentioned; (s. 20) that if any public vaccinator or medical practitioner shall find that a child is insusceptible of successful vaccination or has already had smallpox he shall deliver to the parent or other person a certificate of insusceptibility or of having had smallpox; (s. 21) that every public vaccinator who shall have performed the operation of vaccination upon any child and ascertained that it has been successful shall transmit a certificate certifying that the child has been successfully vaccinated to the registrar; (s. 23) that where the vaccination shall be successfully performed by a medical practitioner not being a public vaccinator the parent or other person shall submit a certificate to such medical practitioner to be filled

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up and signed by him and shall transmit the same to the registrar; (s. 24) that every registrar shall keep a book in which he shall register the certificates transmitted to him as therein provided and shall at all reasonable times allow searches to be made therein; and (ss. 29 and 31) that penalties shall be imposed for failure to comply with the provisions of the Act. The Vaccination Act, 1871, provides (s. 3) that the Act is to be construed as one with the Act of 1867; (s. 5) that guardians shall appoint one or more vaccination officers and that the Poor Law Board (afterwards the Local Government Board) may make rules, orders and regulations, and shall frame appropriate books and forms for the use of vaccination officers under the Acts of 1867 and 1871; (s. 6) that the vaccination officers shall perform all the duties imposed on the registrar with certain exceptions; (s. 7) that overy certificate of a child being unfit for or insusceptible of successful vaccination shall be transmitted to the vaccination officer as if it was a certificate of successful vaccination; and (s. 12) that the public vaccinator may grant a certificate ef the successful vaccination of a child successfully vaccinated, though not by him, and such certificate shall be transmitted and have the same effect as if it were a certificate of successful vaccination by him. The Vaccination Act, 1898, provides (s. 2) that no parent or other person shall be liable to any penalty, if within four months from the birth of the child, he satisfies two justices or a magistrate that he conscientiously believes that vaccination would be prejudicial to the health of the child and within seven days thereafter delivers to the vaccination officer for the district a certificate of such justices or magistrate of such conscientious objection; and (s. 10) that the Act is to be read with the previous Acts. The Vaccination Act, 1907, provides (s. 1) that no parent or other person shall be liable to any penalty if within four days from the birth of the child he makes a statutory declaration that he conscientiously believes that vaccination would be prejudicial to the health of the child and within seven days thereafter delivers or sends by post the declaration to the vaccination officer of the district; and that Act also is to

be read with the previous Acts. The Vaccination Order, 1898, provides (art. 26) that every vaccination officer shall duly observe the Instructions to Vaccination Officers contained in the Fourth Schedule thereto; and (art. 30 (10.)) that the vaccination register to be kept by the vaccination officer as provided by the said instructions shall be in Form L in the Fifth Schedule thereto. That form shows the present form of the vaccination register.

From a consideration of these various provisions it appears that the vaccination register under the earlier Acts of 1867 and 1871, in respect of which the right of search was given, is not the same register as that which has existed since the later Acts came into force.

The register for the purposes of the Acts of 1867 and 1871 was directed to be kept by s. 24 of the Act of 1867, which provided that the registrar should register the certificates transmitted to him as therein provided. Under the Act of 1867 the only certificates transmitted to the registrar for registration in that register were certificates of successful vaccination under s. 21 and s. 23 of that Act. Subsequently, the Act of 1871 provided by s. 7 that certificates of unfitness for or insusceptibility of successful vaccination, and by s. 12 that the certificate therein mentioned, should be transmitted to the registrar for registration in that register. It is to be observed that the words used in these sections in reference to the sending of a certificate for registration in that register are always "transmit" or "transmitted." Under the Act of 1867, s. 14, that register was framed by the registrar-general, and afterwards under the Act of 1871, s. 5, by the Poor Law Board, for which the Local Government Board was substituted, and if the regulations relating to it were not complied with penalties were imposed. Under these Acts vaccination was compulsory on all members of the public and the register was a public register; and, that being so, the right of search given in respect of it by s. 24 of the Act of 1867 was rightly and properly given.

The vaccination register now in use for the purpose of the Acts, including the later Acts of 1898 and 1907, is a register

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in the form provided by the Vaccination Order, 1898, Fifth Schedule, Form L. That register is so different in form from the register previously in use that it cannot be regarded as the same register. It still provides in its first column for certificates of successful vaccination, and in its second column for certificates of insusceptibility to vaccination, but it further provides in its fourth column for a certificate under s. 2 of the Act of 1898, which was not and could not have been included in the register formerly in use. That section in referring to the sending of that last mentioned certificate to the vaccination officer uses the word "deliver" and not the word "transmit," which was the word used in the older register. The regulations relating to the present register are prescribed by the Order of 1898, and any failure to comply with them is reported to the Ministry. Under the later Acts vaccination is no longer generally compulsory. The Act of 1898 enabled a parent or other person to obtain from justices or a magistrate a certificate of conscientious objection, and the Act of 1907 now enables him without going before a public tribunal to make a statutory declaration of conscientious objection. That being so, a right to search the register cannot now be regarded as appropriate, and the right of search which was given by s. 24 of the Act of 1867 in regard to the original register must be treated as no longer existent. When the exemption Acts came into force the right of search became obsolete.

Macmorran K.C. and *Wynn Werninck* in support of the order nisi were not called upon to argue.

LORD HEWART C.J. This is an order nisi obtained at the instance of the governors of the Peabody Donation Fund calling upon the vaccination officer or officers of the guardians of the poor of the borough of Southwark to show cause why a writ of mandamus should not issue directed to them demanding them to allow search to be made of the vaccination register which is kept by their clerk or registrar under the provisions of the Vaccination Act, 1867, s. 24.

The grounds stated in the order nisi are that by s. 24 of that Act and s. 6 of the Vaccination Act, 1871, the said governors are entitled to search the vaccination register kept by the vaccination officer or officers of the Southwark Union.

The case seems to me to be perfectly clear. The facts are not in dispute. An effort was made on behalf of the Peabody Donation Fund to search the register referred to. That effort was resisted upon the ground that search was no longer permitted. The argument which has been developed before us is that although the sections of the earlier Acts have never been expressly repealed, they have nevertheless been impliedly repealed, because of the requirement subsequently made that information which was not contemplated, and indeed which could not have been contemplated, by the earlier Acts, must now appear in the register. The argument is that by reason of that subsequent addition of information the register has either ceased to be a register or has ceased to be the register referred to in the earlier statutes.

The argument seems to me to be quite unsustainable. When one looks at the Act of 1867, it is apparent by s. 24 that the registrar is to keep a book in which he is to enter certain minutes of notices and is to register the certificates transmitted to him as therein provided. Those were certificates of successful vaccination, referred to in s. 21 of the Act so far as the public vaccinator is concerned, and in s. 23 of the Act so far as vaccination by a medical practitioner not being a public vaccinator is concerned. The register was then a register of certificates of successful vaccination. Under that Act two other kinds of certificate were contemplated and provided for, though it was not provided in regard to them that the certificate should be transmitted and registered. There was under s. 18 the certificate of unfitness of the child for vaccination, and there was under s. 20 the certificate of insusceptibility of successful vaccination or, alternatively, of the fact that the child had already had smallpox. At that time these certificates were not matter for transmission and registration. By the Act of 1871, however, those certificates also required to be registered.

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Then came the Act of 1898, which provided for the obtaining of a certificate of what is briefly termed conscientious objection to vaccination. That necessitated a change in the condition of the register by the provision of a fourth column for the "date of certificate under s. 2 of the Vaccination Act, 1898." In other respects the register is in the condition in which it was on the passing of the Act of 1871. The medical certificate of successful vaccination remains. That is the starting point and the foundation of the whole. The certificate of insusceptibility or of previous smallpox remains. The name of the medical man remains as before. The new ingredient is the certificate under s. 2 of the Act of 1898. The learned counsel who has argued on behalf of the Board of Guardians has, of course, put the best possible face upon the matter, but except for controversial purposes it seems to me to be hopeless to contend that the addition of the further and obviously necessary ingredient to which I have referred takes away from the register the character of being the register referred to in the Acts of 1867 and 1871. In these circumstances I think that this rule ought to be made absolute.

AVORY J. I agree. I am unable to appreciate the reason given in the respondents' affidavit for their refusal to allow a search of the vaccination register to be made in this case. I agree that the rule should be made absolute.

SHEARMAN J. I agree, and I have nothing to add.

Order absolute.

Solicitors: *Percy Robinson & Co.; G. A. Martin.*

J. R.

LEIGH *v.* INLAND REVENUE COMMISSIONERS.

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May 17.

Revenue—Super Tax—Interest on Bonds—Arrears paid in one Sum—Income of Year in which Payment made—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 5, *sub-s.* 3 (*c*).

The appellant in August, 1918, bought bonds of a company incorporated under the law of Canada. At the time of his purchase the interest on the bonds had been unpaid since July, 1914. After the purchase the arrears of interest, as well as the succeeding instalments, remained unpaid till 1921, when a scheme was adopted and sanctioned by the Court in Canada. In consideration of certain terms as to repayment, the company undertook to pay the arrears of interest up to July 1, 1919, and they paid the arrears accordingly. The appellant was assessed to super tax on the basis that all the interest so paid formed part of his income for the year ending April 5, 1922, and was therefore assessable to super tax for the year 1922–1923:—

Held, that the whole of the interest paid in 1921 was part of the appellant's income for the year ending April 5, 1922, and was therefore, under s. 5, sub-s. 3 (*c*), of the Income Tax Act, 1918, assessable to super tax for the following year (1922–1923).

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Special Commissioners held on September 17, 1924, the appellant appealed against an assessment to super tax in the sum of 3603*l.* for the year ending April 5, 1923, made upon him under the provisions of the Income Tax Acts. The sole question upon which the opinion of the Court was desired was whether certain arrears of interest received by the appellant in August, 1921, in respect of mortgage bonds of the Mexican Electric Light Company, Ld. (which interest had accrued due and was payable on dates prior to the purchase of the bonds by the appellant), ought to be included in the computation of his income for the purposes of super tax for the year ending April 5, 1923.

The appellant made purchases to a total amount of $25,000 between August 9 and August 16, 1918, through a firm of brokers on the London Stock Exchange, of 5 per cent. mortgage bonds to bearer of the Mexican Electric Light

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Company, Ld., a company incorporated in Canada. The interest on those bonds was due and payable half yearly on January 1 and July 1 in each year, and coupons for each half year's interest were attached to the bonds, each coupon bearing the half yearly date on which such interest became due.

Owing to the unsettled condition of affairs in Mexico the company had not been able to pay any half year's interest since that which became due and payable on July 1, 1914, and the coupons for the interest which had become due and payable on January 1 and July 1 in each year from 1915 onwards were still attached to the bonds purchased by the appellant. In accordance with the rules of the London Stock Exchange they became his property at the dates when he made the purchases.

The company resumed payment of interest in 1921. In May, 1921, a scheme of arrangement was put forward by a committee which had been formed to protect the interests of the bondholders of the company and other allied companies. Under that scheme, which was approved by the bondholders in June, 1921, and sanctioned by the Canadian Courts in July, 1921, it was arranged that concessions should be made by the bondholders as to the payments due to be made to a sinking fund for redemption of the bonds and as to the date of maturity of the bonds. The arrears of interest were to be paid to the bondholders, as to the coupons due from January 1, 1915, to July 1, 1919, inclusive, immediately upon the sanction of the Court to the scheme; as to the coupons due January 1, 1920, and July 1, 1920, on or before June 30, 1922; and as to the coupon due January 1, 1921, on or before June 30, 1923. The payment of current interest was to be resumed with the payment of the coupon due July 1, 1921. In accordance with the scheme arrears of interest up to and including that due on July 1, 1919, were paid to the bondholders in August, 1921.

In the case of the bonds belonging to the appellant the arrears of interest due on the coupons dated January 1, 1915, to July 1, 1919, inclusive, and the interest on the

coupon dated July 1, 1921, were collected by the Westminster Bank, Ld., on behalf of the appellant in August, 1921. Income tax at the rate of 6*s.* in the pound, being the rate in force for the year ending April 5, 1922, was deducted from that interest and paid over to the Revenue authorities in accordance with the provisions of r. 7 of the Miscellaneous Rules applicable to Schedule D of the Income Tax Act, 1918. The balance of the interest was credited to the appellant's account at the Westminster Bank, Ld. The appellant was not required by the contracts of purchase to pay over any part of that interest to the persons from whom he had purchased the bonds, and he did not in fact do so.

It was contended by the appellant that the interest which had accrued due and was payable on January 1, 1915, and on succeeding half yearly dates down to and including July 1, 1918 (in arrear at the time when he purchased the bonds), had not arisen or accrued to him; that the interest was not receivable by him, but was receivable by the vendors of the bonds; that such interest had been purchased with his capital and was in his hands capital and not income; that the fact that the vendors of the bonds had sold the right to interest which had accrued to them and which had become payable to them before the sale did not transfer to the appellant any liability for super tax in respect thereof; and that such arrears of interest ought not to be included in the computation of his income for the purposes of assessment to super tax.

It was contended on behalf of the Crown that the whole of the interest received by the appellant in August, 1921, formed part of his income for the year in which payment was received from the company—namely, the year ending April 5, 1922—and was properly included in the computation of his income for the purposes of assessment to super tax for the following year—namely, the year ending April 5, 1923.

The Special Commissioners held that the sum of 1858*l.* 7*s.* 11*d.* paid to the appellant as interest on the bonds in August, 1921, was part of his income for super tax purposes

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for the year ending April 5, 1923, and confirmed the assessment.

Cyril King for the appellant.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the Crown.

ROWLATT J. The appellant in August, 1918, bought a number of bonds of a company incorporated under the law of Canada. The bonds bore interest, but at the time of his purchase the interest was unpaid since July 1, 1914. After his purchase those arrears remained unpaid, and the succeeding instalments of interest remained unpaid until the middle of 1921, when a scheme was adopted and sanctioned by the Court in Canada in that year. In consideration of certain terms as to sinking fund and repayment, the company undertook to pay the arrears of interest, and they at once paid the arrears up to 1919, as the scheme provided.

The appellant, therefore, soon after the decision of the Court, was paid the arrears for 1914–19 inclusive, subject to deduction of income tax before payment. The Revenue authorities had assessed him to super tax for the next year on the basis that all that interest was income of 1921, and, therefore, assessable to super tax for 1922–23. That assessment was objected to on the ground that those payments were "received," but not "receivable" in 1921; that they were "receivable" in 1914 and subsequent years, and, therefore, the liability to super tax belonged to those years, and the sellers of the bonds were in the position of having the income "receivable" down to 1918.

The Attorney-General took the point that, even assuming that that was the correct construction of the statute, on the facts of this case this interest only became payable under the order of the Court—i.e., in 1921. I do not think that that was a good point. It was "receivable" at each date as the coupons fell due; it continued "receivable." The Court did not fix a new date, but provided that there should be no more delay. It was not suggested that the old debts were merged in a new debt. The payments of interest due

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Rowlatt J.

on particular dates were made under the order, because they were already due on those dates.

That brings me to the real point, which is of great importance. The taxable income for super tax is the total income for the previous year, and one has to find out what that is. If it has been directly assessed to income tax that settles the matter, but if it has not, it remains to be dealt with. Mr. King said that the matter was settled by s. 5 of the Income Tax Act, 1918. That section, in my judgment, was designed to eliminate any question of accrual or gradual growth of the income. In certain cases for income tax purposes when tax is deducted before receipt, it is deducted according to the rate in force when the money accrued, which in some cases means an average rate. But for super tax purposes there is to be one rate only. It was intended in the case of super tax to avoid any variation in the rate. In doing so the statute has used the word "receivable," and that is what Mr. King has fastened upon. It is to be remembered that for income tax purposes "receivability" without receipt is nothing. Before a good debt is paid there is no such thing as income tax upon it. The meaning of the section must be "receivability" speaking of a debt which has been received, and means the date on which it is paid as distinct from the date on which it was accruing.

I should not have had any doubt but for a Scottish case which caused me considerable difficulty. In *Inland Revenue Commissioners* v. *Earl of Haddington* (1) a man who had come into some estates found them burdened with payment of a jointure to his mother. Owing to some dispute as to the amount he did not pay it in the first year, but paid two years together in the second year. It was held that he could not deduct the whole payment in the second year, but must spread it over the two years. It seems to follow that payable and receivable are correlatives, and that the mother would, on that footing, be entitled to spread the receipt over two years. But the point was never argued and never occurred to any one. The whole question was the liability of the Earl. I

(1) (1924) 8 Tax Cas. 711.

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think that if the point had been taken, the decision would have had to be the other way. In view of the terrible confusion which would arise if I accepted the appellant's arguments, I think that I must have courage and dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Godden, Holme & Ward.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

F. C.

1927
June 14, 15, 16.

KASLER AND COHEN *v.* SLAVOUSKI.

[1926. K. 536.]

Damages, Measure of—Sale of Goods—Breach of Warranty—Sub-sales—Costs of Actions between successive Vendors—Reasonable Defence—Liability of original Vendor.

B., a wholesale furrier, bought some dyed rabbit skins from A. for the purpose, as A. knew, of making them into fur collars. B. having made the fur collars, resold to C., C. resold to D., and D. to E., a draper.

E. then sold a coat, with one of these fur collars attached, to F., a customer, for her own wear. F. developed "fur dermatitis," owing to antimony in the fur. F. sued E. for damages for breach of warranty on the sale of the coat. E. gave notice of the action to D., D. to C., C. to B., and B. to A.

E. defended, but judgment was given against him for 67*l.* and 248*l.* costs. E. claimed this sum, together with his own costs, 643*l.* in all, from D., who paid without resisting the claim. D. recovered this amount from C. together with a further sum for his costs. C. claimed from B., and B. having paid 654*l.* and 45*l.* for costs, sued A. for 699*l.* damages for breach of warranty on sale of the skins.

The Court found as a fact that E. had acted reasonably in defending the original action by F.:—

Held, that B. was entitled to recover from A. (1.) the damages recovered in the original action by F., (2.) the costs of both sides in that action, and (3.) a sum in respect of costs incurred by themselves and C. and D. respectively in connection with the claims against them.

ACTION before Branson J. without a jury.

In June, 1923, the plaintiffs, who were wholesale furriers, bought some dyed rabbit skins from the defendants for

the purpose, as the defendants knew, of their being made into fur collars for women's coats. The plaintiffs, having made the skins into fur collars, resold to a firm known as Messrs. Mace, Rainbow & Stone. The latter firm resold to Scott, Son & Co., who in turn sold to Alexander McMillan, a draper, carrying on business in Edinburgh. McMillan afterwards sold a coat with one of these fur collars attached to a Miss White, a certified nurse. After wearing the collar and coat Miss White developed dermatitis, and brought an action against McMillan in the Court of Session in Edinburgh for damages for breach of warranty on the sale of the coat. McMillan gave notice of this action to Messrs. Scott, Son & Co., who in turn gave notice to Messrs. Mace, Rainbow & Stone. They gave notice to the plaintiffs, and they in turn to the defendants. McMillan defended the action, but judgment was given against him for 67*l.* and costs amounting to 248*l.* He thereupon made a claim against Messrs. Scott, Son & Co. for 643*l.*, being the sum of 315*l.* together with his own costs of action, 328*l.* Messrs. Scott, Son & Co. paid this amount, and issued a writ in the King's Bench Division against Messrs. Mace, Rainbow & Stone for 643*l.* They did not defend the action, but paid this sum and 21*l.* costs.

Messrs. Mace, Rainbow & Stone then issued a writ against the plaintiffs for 654*l.*, as the amount of damages suffered by them from the breach of warranty on the sale to them. The plaintiffs did not defend this action, and ultimately paid Messrs. Mace, Rainbow & Stone 654*l.* and 45*l.* costs of the action. The plaintiffs gave the defendants notice of this claim and of their intention not to defend. They now claimed from the defendants 699*l.* damages for breach of warranty on the sale of the skins to them.

Branson J. found as a fact that the dermatitis which attacked Miss White was caused by the presence of antimony in the dyed skin which formed the collar of the coat in question.

The material question for the purpose of this report was how far the chain of contracting parties was to be followed by the plaintiffs in order to calculate the damages against the

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defendants for breach of warranty in supplying to the plaintiffs a skin not fit for the purpose for which it was sold.

Schiller K.C. and *H. D. Samuels* for the plaintiffs. There is clear evidence here that the defendants knew the purpose for which these furs were supplied and their warranty of quality under the Sale of Goods Act, 1893, s. 14, ran through the series of sub-sales which followed. Upon the authority of *Hammond & Co.* v. *Bussey* (1) and *Agius* v. *Great Western Colliery Co.* (2) we are entitled to recover not only the actual damages, but also the whole of the costs which we have had to pay. There is no reason to confine the principle to the first sub-sale. The damages come within the second rule in *Hadley* v. *Baxendale* (3), being damages which would not arise in the usual course from a breach of contract, but which do arise from circumstances peculiar to the special case; these are recoverable here, because the special circumstances were known to the defendants and to the vendors in each of the sub-sales. No question as to remoteness of damages arises.

McMillan acted reasonably in defending the claim made against him. Before the trial it was not clear whether the collar contained deleterious matter or not. Notice of claim was passed on by McMillan to the prior parties, and the plaintiff in turn informed the defendants.

J. B. Matthews K.C. and *R. F. Levy* for the defendants. We do not object to paying the actual damages given in the original action, but the question is as to the measure of damages. In *Agius* v. *Great Western Colliery Co.* (2) the plaintiff recovered as damages the amounts of costs reasonably incurred by him in defending an action over and above party and party costs.

This decision followed *Hammond & Co.* v. *Bussey* (1), but the principle ought not to be extended indefinitely to a series of sub-sales. Beyond the first sub-sale damages of this nature are too remote, and it would be unfair if the original

(1) (1887) 20 Q. B. D. 79. (2) [1899] 1 Q. B. 413.
(3) (1854) 9 Ex. 341.

vendor after a series of sub-sales was obliged to pay all the costs incurred by a string of persons who claim to have acted reasonably in defending actions brought against them. We are only liable to the extent of the original damage. In *Borries* v. *Hutchinson* (1) the Court held that while a purchaser who had resold might recover loss of profit due to breach of contract, he could not recover further loss of profit, which his sub-purchaser had succeeded in recovering against him. The costs which it is sought to recover here are equally too remote.

[They cited also *Bostock & Co.* v. *Nicholson & Sons, Ld.* (2)]

Further, McMillan did not act reasonably in defending the action brought by Miss White. He might have settled the action, as the evidence shows, for 50*l.* No costs need have been incurred by the intermediate parties.

We rely on the decision of Shearman J. in *Walter Potts & Co.* v. *Brown, Macfarlane & Co.* (3) on January 31, 1923, in which he said in the course of his judgment: "There is one other matter I have to deal with. In this case the plaintiff sold to Athus and Athus sold to Kittel. I think it is quite clear that through the default of the manufacturer, Bradley, all these different series of contracts broke down, because they could not get the goods from Bradley. There was a variety of breaches of contract and causes of action arising all along the chain. Kittel sued Athus, and Athus defended the action. I think they reasonably defended it. The main issue in that case was the same as the issue here, but there was another point as to another 100 tons with which I am not concerned. A very large amount of costs was incurred, something like 800*l.* or 900*l.* Eventually, Athus having to pay this sum to Kittel came to the plaintiff, and the plaintiff chose to pay, and did pay. He may have been well advised to pay. At any rate, he chose to pay, and did pay these costs to Athus. Now he is suing the defendants, and he says: This was one of the breaches; the same issues were tried; this really was helpful, because it decided whose the

(1) (1865) 18 C. B. (N. S.) 445. (2) [1904] 1 K. B. 725.
(3) Unreported.

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fault was in the chain of contracts which depended on the original supply of Bradley to the defendant. He says that on the principle of *Hammond & Co.* v. *Bussey* (1) and *Agius* v. *Great Western Colliery Co.* (2) he is entitled to have those costs as damages. To my mind he cannot recover them. All these cases rest on the assumption of an ordinary claim for damages simply, the price of goods, and nothing more; but where under special circumstances you sell to a person with knowledge that he is selling to somebody else that is a special contract, and it may reasonably be taken to be in the contemplation of the parties as damage which will result from the breach, that if you cannot deliver the goods, the merchant to whom you sold for reselling may have to defend an action himself on the part of his buyer. All this rests, when one looks at the cases, on knowledge that the person to whom you are selling is a merchant, who, as you know, is going to resell. I know of no case where the right to recover costs as part of the damages is carried further than the costs paid to the person who contracted with you. It is said: The plaintiff bought from you, sold to Athus, and Athus sold to Kittel. If Athus and Kittel get into litigation you can pay Athus' costs and then sue your seller for them. I cannot extend the principle to that length. A man is not taken necessarily to know that if he sells to another merchant that merchant will necessarily sell to a third merchant. It may well be he is selling to somebody to resell to a person for his own use, for example, to a foundry. I do not see, if one is to extend the principle, where one would stop. Possibly in a string of contracts, such as happens with regard to produce, you might have 12, 14 or 16 people in front of you, and you might have 12, 14 or 16 actions. The principle has never been extended beyond this, that if you choose to sell to a merchant who is selling to somebody else, it goes to the length that if you reasonably defend, it may be taken to be in the contemplation of the parties as arising from your breach of contract. I do not think I ought to extend the principle so far as is asked, because it may well be that the person to whom you

(1) 20 Q. B. D. 79. (2) [1899] 1 Q. B. 413.

sell not only may sell to somebody else, but may sell to somebody else who may himself try to make another profit on the sale to somebody else. Therefore you cannot extend it beyond the one sub-contractor. It seems to me that claim is too remote."

Schiller K.C. in reply. As regards the judgment of Shearman J. in *Walter Potts & Co.* v. *Brown, Macfarlane & Co.* (1) we submit, with respect, that the decision was wrong, and that there is no reason for limiting the principle enunciated in *Agius* v. *Great Western Colliery Co.* (2), as is suggested. In *Bostock & Co.* v. *Nicholson & Sons* (3) there was no warranty of quality as there is here, because the buyers did not make known to the sellers the purpose for which they required the goods. In *Borries* v. *Hutchinson* (4) the loss of profits was held not to be recoverable, because it could not have been in the contemplation of the parties that a subsequent purchaser who lost profit should claim from the plaintiff and so make the defendant liable to him for it Damages were too remote in that case, but no such principle applies here.

BRANSON J. [after deciding the above questions of fact in favour of the plaintiff, continued:] The next question is how far the chain of contracting parties can be followed up by the plaintiffs in order to calculate the damages against the defendants for the breach of the defendants' contract in supplying to the plaintiffs a skin which was not fit and proper for the purpose for which it was sold. The case proceeded upon the assumption that the contract between the plaintiffs and the defendants was one in which the vendor knew the purpose for which the purchaser was purchasing the goods, and that consequently the case is one to which the Sale of Goods Act, 1893, s. 14, is applicable. Mr. Slavouski was perfectly candid about it, and he knew, and of course must have known, that these skins which he was selling were for the purpose of being made up into garments to be worn by women, and consequently

(1) Unreported.
(2) [1899] 1 Q. B. 413.
(3) [1904] 1 K. B. 725.
(4) 18 C. B. (N. S.) 445.

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if the fur contained in it anything which was deleterious to the human skin, it was fur which was being supplied not only in breach of contract, but fur which would cause damage to any one who should wear it; and I think it may not be immaterial to mention that the presence of this deleterious substance in the skin was a matter which nobody could discover until the skin should be worn and the defect made manifest by the damage occurring to the skin of the wearer. The plaintiff says: "I am entitled to claim both the original damages which I have had to pay—67*l.*—and also in addition, by way of damages, the costs which I have had to pay to the parties to whom I sold, and to whom my vendee sold, and to whom his vendee sold these goods, with the same warranties and under the same circumstances"; and the question is whether he can recover it or not. It is admitted for the purposes of this case and the argument in this Court, that the 67*l.* damages can be so recovered, but it is contended for the defendants that with regard to the costs different considerations apply and that they are too remote; and in support of his contention Mr. Matthews quotes a judgment delivered by Shearman J. on January 31, 1923, in *Walter Potts & Co.* v. *Brown, Macfarlane & Co., Ld.* (1) In that case the claim was for damages for non-delivery of certain pig iron sold by Brown, Macfarlane & Co. to Walter Potts & Co. Potts had sold it to Athus, and Athus had sold to Kittel, and Kittel had sold to some other purchasers who did not enter into the story in that case. Kittel had sued Athus, who defended, and having to pay costs to Kittel, came back upon the plaintiff. The plaintiff paid the costs, and sued the defendants for damages for non-delivery of the iron and also for the costs, and Shearman J. held that he could not recover. Naturally that case is relied upon as an authority for the proposition that costs in this case cannot be recovered here by Kasler & Cohen.

It becomes necessary for me herefore to consider the state of the authorities in this matter as they have been laid before

(1) Unreported. Supra p. 81.

me. The plaintiffs rely upon the decisions in *Hammond & Co.* v. *Bussey* (1) and *Agius* v. *Great Western Colliery Co.* (2) What the plaintiffs say is this: That where you have a case in which a person in buying goods has expressly or impliedly made known to the vendor the purposes for which he buys, and goods are supplied which are not fit for that purpose, but the purchaser relying upon the goods being fit for that purpose has resold and his vendee has recovered damages against him, then the purchaser may go back upon the vendor and claim not only that which he has had to pay, but also the costs which he may have incurred in reasonably defending the claim of the sub-vendee against himself. That seems to me to be the state of the law as laid down by those two cases. If a man has sold goods to another in such circumstances as to fix him with special knowledge of the purpose for which those goods are being bought, and that other sells them on the same terms and conditions and then is subjected to an action because the goods do not come up to the contract quality, or for any other reason entitling him to claim damages upon such contract, the first purchaser is entitled, if he has acted reasonably in defending the action and has yet been cast in damages and costs, to claim from his seller not only the damages but also the costs he has had to pay.

It is said that that rule extends to enable the first purchaser to recover from the original seller what he may have had to pay his sub-vendee, and that it may entitle the sub-vendee, if he has sold on, to recover from the first purchaser, but it is said you can never go back more than two steps. With the greatest possible respect for the judgment of Shearman J. I do not follow that. It seems to me that so long as you have got the same contract passing along the same article from hand to hand, with the same warranty and particularly in such a case as this, where the breach of contract which gives rise to the damage consists in there being in that article something which the maker of it and each vendor of it knows can only be discovered to

(1) 20 Q. B. D. 79. (2) [1899] 1 Q. B. 413.

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exist when it comes into the hands of the person who is ultimately going to put it in use, there can be no logical or just reason for drawing such a line as suggested and saying that while all down the line you may apply the principle of *Hammond & Co.* v. *Bussey* (1) to each vendor so as to enable him to sue and recover from his vendor damages which his vendee may have recovered from him, yet you cannot allow him to recover damages which the vendee of his vendee may have recovered, and he has consequently had to pay.

I have been referred by the defendants' counsel to the case of *Borries* v. *Hutchinson* (2), where the Court held that whilst a man who had contracted to buy goods and resell them to a purchaser in Russia might recover against his vendor by way of damages the loss of profit which the Russian purchaser had made and had recovered against him, yet he could not recover a further loss of profit which the sub-purchaser had succeeded in recovering against the Russian purchaser; and it is said that the same principle applies here. To my mind there is a clear distinction between that case and this. The plaintiff was entitled to recover the loss of profit made by the first Russian purchaser, because in the circumstances of that contract the Court held that communications which had been made to him had been such as to make it right to imply that it was in the contemplation of the parties that if he broke the contract his purchaser would be obliged to pay the loss of profit made by the Russian; but it was said that it was too much to imply that it was in the contemplation of the parties that any subsequent purchaser who lost a profit should be entitled to claim back his loss from the plaintiff and so make the defendant liable to the plaintiff for it, and consequently that the damages were too remote, being damages which did not arise in the natural and ordinary and probable course of events, and were not in the contemplation of the parties at the time when the contract was made.

In this case however it must have been within the contemplation of the parties that if there was a breach of this

(1) 20 Q.B.D. 79. (2) 18 C. B. (N. S.) 445; 34 L. J. (C. P.) 169.

contract of the nature which has occurred here damages would be claimed by parties, I will not say "remote," but separated by several contractual steps from the parties to the original contract. Let me explain what I mean. When Slavouski sold these skins to Cohen he did not expect Cohen to wear them round his own neck; he knew Cohen was going to make them into collars, which he would sell, not being a retail trader, to somebody who would use them in some other way, but each party knew that at long last the collar was going to be worn by somebody, and that if it was faulty in the way in which this collar was faulty, then somebody at the end of the line would suffer, and therefore there might be a claim by some one removed, not one step, but many steps from the original seller of the skins.

In my view, therefore, it is correct to say that the 67*l.* damages which Miss White recovered from McMillan are properly recoverable, and I can formulate no distinction between damages and costs which are reasonably and properly incurred in defending an action for damages, whether they result in reducing the damages or not. If the claim is reasonably and properly resisted, then, as it seems to me, the amount that the vendee has to pay in costs to his sub-vendee is really just as much his damages as that which he has to pay in actual damages.

The only question left is one of fact, and that is, to what extent were the various claims in this case reasonably defended? It is said by Mr. Matthews that McMillan was not reasonable at all; that he ought to have settled, and that if he had settled for 50*l.* none of this trouble would have arisen and none of these costs would have been incurred, but that, of course, is an argument ex post facto, and in order to determine the reasonableness of the conduct of the parties one must transport oneself to the time when and the circumstances in which they were acting. With regard to this, in April, 1924, Miss White was making this claim against McMillan. At first she wanted 100*l.*, and McMillan referred to Scott & Co. about it, and Scott & Co. said: "You had better try and negotiate, and if it is a

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reasonable amount you had better settle, but we do not want a very heavy claim." Then there were certain negotiations, and ultimately Miss White said she was prepared to take 50*l.*

While the question was being discussed whether 50*l.* was a proper sum to pay or whether it was not, the analyst's report appeared, and it came into the hands of those who were concerned in this matter. That report completely exonerated this collar from any deleterious matter at all, and the settlement not having been concluded, the parties, naturally and reasonably and properly in my view, came to the conclusion that here was a case to be fought. If upon that report they had paid Miss White either the 50*l.* or the 100*l.* she claimed when she issued her writ in May, 1924, one can well imagine what the parties higher up the line would have said. They would have said: "You chose to pay when the analyst appointed by the leather trade has said there is not a scrap of deleterious matter in this fur, how can you expect us to reimburse you?" The case comes within the words of Lord Esher in delivering judgment in *Hammond & Co.* v. *Bussey.* (1) He said: "Under those circumstances it would not have been reasonable, either on their own account or on that of the defendant, for the plaintiffs to submit to judgment at once without defending the action or testing the claim in any way." I think those words apply here. It would not have been reasonable in these circumstances to have submitted without testing the case. They contested the claim, and in my view it was a perfectly reasonable attitude. [His Lordship then found as a fact, so far as it was material to the case, that the plaintiffs had informed the defendants that claims were being made against them that the furs sold to them by the defendants contained deleterious matter, which had affected the skin of persons wearing them. His Lordship then continued:] There is only one other matter, and it is this, that there may well be a difference on the question of adding costs to damages, or treating costs incurred as part of the damages between those costs which were incurred

(1) 20 Q. B. D. 79, 87.

originally in the course of contesting the validity of the claim made for damages by reason of the breach, and intermediate costs incurred by one party or another party resisting an attempt to pass the claim back. Whether a particular amount of resistance is or is not reasonable is, I think, a question of fact, and it seems to me that in so far as resistance is reasonable in the circumstances, then each person who so resists has suffered extra damage measured by the amount of resistance. Nothing has been said to indicate that there was anything unreasonable in the amount of resistance which any one of these people put up.

I think it must be reasonable for anybody before submitting to a liability of this kind to see a solicitor and have advice, and what I propose to do is to find that the damages to which the plaintiffs are entitled as against these defendants are, the amount of the damages that Miss White recovered and the amount of the costs of the action in Scotland on both sides, which together came to 643*l.* 14*s.* 1*d.* and five guineas costs for each of the intervening parties.

Judgment for plaintiffs accordingly.

Solicitors for plaintiffs: *Leonard Bingham & Sharp.*
Solicitors for defendants: *Herbert Baron & Co.*

F. P. F.

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April 11, 12;
May 30, 31;
June 23.

[IN THE COURT OF APPEAL.]

MUSMANN *v.* ENGELKE.

[1926. M. 2318.]

International Law—Diplomatic Privilege—Immunity from judicial Process—Official at Embassy—Consular Secretary—Statement by Attorney-General on Behalf of Foreign Office as to Status—Whether conclusive—Affidavit of Defendant as to Grounds of Immunity—Right of Plaintiff to cross-examine.

The plaintiff issued a writ against the defendant for rent due and breach of covenant in respect of a lease of certain premises. The defendant thereupon issued a summons to set aside the writ on the ground that he was a consular secretary on the staff of the German Embassy in London and had been notified as such to the British Foreign Office, and that his name appeared in the diplomatic list issued by the Foreign Office. In support of the summons the defendant filed an affidavit in which he deposed to the above facts and exhibited a certificate of the German Chargé d'Affaires and also a certificate of the British Foreign Office. In the latter certificate it was stated that the defendant's name as returned by the German Ambassador to the Foreign Office appeared in the Foreign Office Lists of 1921, 1922 and 1923 as assistant clerk to the German Ambassador, and in and since 1924 as consular secretary on the staff of the German Ambassador. The plaintiff alleged that the duties performed by the defendant were consular, and that he was not therefore entitled to the diplomatic privilege he claimed, and he applied to the Court for an order to cross-examine the defendant on his affidavit. Shearman J. made the order asked for. The defendant appealed. On the hearing of the appeal the Attorney-General appeared at the request of the Foreign Office to support the statements contained in the Foreign Office certificate as to the status of the defendant:—

Held (by Scrutton and Sargant L.JJ.; Lord Hanworth M.R. dissenting), that the Court could not accept the statement of the Attorney-General as to the result of the Foreign Office intervention as binding and conclusive on the Court; that to do so would be to substitute a department of the Government for the Courts in a class of case where such substitution had never hitherto been recognized; that there was no case where the Court had asked the Foreign Office for information as to the position of a servant of an Embassy, or where the Attorney-General had attended to give the Court such information; and that the Court was not disposed to make a precedent.

Held, also, that the question of the immunity of the defendant could only be decided after the relevant facts had been ascertained in the usual way, and that the cross-examination of the defendant, who had made an affidavit, was necessary for that end.

Duff Development Co. v. *Kelantan Government* [1924] A. C. 797 distinguished.

Decision of Shearman J. affirmed.

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APPEAL from a decision of Shearman J.

The following statement of facts is taken from the written judgment of the Master of the Rolls :—

"On July 28, 1926, the plaintiff in this action issued a writ against Hermann Gustav Constantine Engelke, claiming, in the statement of claim upon the back of the writ, arrears of rent due under a lease dated August 18, 1924, made between the plaintiff and defendant whereby the plaintiff let to the defendant certain premises known as 'The Oaks,' No. 3 Frognal, Hampstead, together with other items stated therein. The writ was served upon the defendant, and on July 30 his solicitors wrote to the plaintiff's solicitors informing them that the defendant was 'an official at the German Embassy duly registered on the list of officials kept by the Foreign Office and our client is therefore entitled to diplomatic privilege. May we refer you to the Diplomatic Privileges Act (7 Anne 12)?' and adding: 'Will you kindly inform us that in these circumstances you will withdraw the writ and give notice of discontinuance?' The plaintiff's solicitors declined to accede to this request and said: 'If your client intends to set up the plea of diplomatic privilege we must put him to strict proof.' The defendant entered a conditional appearance on August 5, and on August 12 a summons was issued on behalf of the defendant for an order to set aside the writ and all subsequent proceedings 'on the ground that the defendant is a consular secretary on the staff of the German Embassy since November 25, 1920, and has been notified as such to the British Foreign Office, and that the defendant s name appears in the diplomatic list issued by the British Foreign Office.' This summons was accompanied and supported by an affidavit made by the defendant's solicitor affirming the above facts and exhibiting a certificate to the same effect, dated August 5, under the hand and seal of the German Chargé d'Affaires in London. When the summons was heard on August 26, the senior Master made an order, as asked, setting aside the writ and all subsequent proceedings. From this order an appeal was taken to Talbot J. on October 18, when the learned judge, acting

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upon the materials then before him, allowed the appeal and ordered that the plaintiff should be at liberty to proceed with his action. The learned judge further ordered that the defendant should have leave to appeal, and also ten days' further time to apply to set aside the writ. This latter portion of the order gave the defendant an election. He decided not to appeal, but to make another application to set aside the proceedings and issued a summons the same day, October 26, to set aside the writ and all proceedings 'on the ground that the defendant is in the service of the Ambassador of the German Empire at the Court of St. James', London, since November 25, 1920, and had been notified as such, etc.' On November 3 the defendant swore an affidavit stating that he holds the position of consular secretary on the staff of the German Embassy; that in all his work he is answerable only to the German Ambassador; and 'further I perform general duties which fall upon the staff of the Embassy such as the coding and decoding of telegrams.'

On November 9 notice was given on behalf of the plaintiff that on the hearing of this second summons to set aside the writ, application would be made for leave to cross-examine the defendant upon the affidavit sworn by the defendant.

On December 3, 1926, a certificate was obtained from the Foreign Office, signed by an Assistant Under-Secretary of State and sealed with the seal of the Foreign Office, stating that the name of the defendant appeared in June, 1921, in the Foreign Office list of persons composing the diplomatic establishments and households of each embassy and legation, and thereafter till 1924 as assistant clerk on the staff of the German Ambassador, and since then as consular secretary on the staff of the German Ambassador.

On December 8 the defendant swore a further affidavit repeating the statements made in his former one, and stating in para. 2: 'I am exclusively employed on the staff of the Embassy, and have no duties save on the said staff and am not allowed to do any work apart from my duties at the Embassy. I am in every way a regular member of the

Embassy staff and am responsible to the Ambassador for every part of my work.' He also exhibited the notification to the British Foreign Office of his having taken the place in the German Embassy of a predecessor, whose return to Germany was therein officially notified. That notification was dated November 30, 1920.

The above affidavits were controverted by the plaintiff, who affirmed that the defendant was a consular secretary, doing consular work only, which work had now been transferred to the German Embassy at Carlton House Terrace from 21a Bedford Place.

On December 9 the Master ordered that the defendant should be allowed generally and without specific attention to their contents to put in his affidavits without being cross-examined upon them; but on appeal Horridge J. remitted the matter to the Master again to decide upon the contents of the affidavits whether the defendant should attend for cross-examination.

On February 15, 1927, on the matter thus coming before him for further consideration upon the affidavits, the Master refused to order the defendant to be cross-examined, and on March 4 Shearman J. allowed an appeal from the Master's order and ordered 'that the defendant do attend for the purpose of cross-examination.' He gave leave to appeal to this Court, as he considered the matter of such importance that it should be decided after argument in Court, and the defendant has appealed, asking that the order of the Master refusing to order cross-examination may be restored."

The appeal was heard on April 11 and 12 and May 30 and 31, 1927.

On the hearing of the appeal the Attorney-General appeared at the request and on behalf of the Foreign Office to support the statement made by that office as to the status of the defendant. In the course of his argument he made the following statement for the information of the Court:—

"I am instructed by the Foreign Office to inform your Lordships that this gentleman has been appointed as a member

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of the staff of the German Ambassador under the style of consular secretary and has been received in that capacity by the British Government. His name has been submitted to the Foreign Office by the Ambassador in the usual way, and his position as a member of the Embassy is and has been since December, 1920, recognized without reservation or condition of any sort. He has been engaged during the last twelve months, at any rate, as a member of the staff of the commercial division of the Embassy. As such he has been obliged to take part from time to time in the general work of the Embassy staff, and particularly as regards the ciphering and deciphering of telegrams, that is telegrams from the German Ambassador to his Government. He is responsible in all that he does to the German Ambassador; that is the information which I am instructed to give your Lordships."

Then in answer to Lord Hanworth M.R. the Attorney-General replied:—

"The reason I put it in the form I did was because the Foreign Office is the authoritative department of the Government to determine these questions as to the status of diplomats and the like, and therefore the information which I give to the Court is information which necessarily I derive from the appropriate department as being the proper Minister of the Crown to give the information. I most unhesitatingly adopt what I have said as the Attorney-General."

"I have given your Lordships the information which I have derived in that way. May I say at once that there are cases which show that the mere fact that somebody's name has got into the Foreign Office List is not conclusive, and it obviously is not, if I may just give one reason; a man may have ceased to be attached after the date of the list. The Courts obviously can go behind that list which is published to the sheriffs, and is not information given by the Foreign Office to the Court at all when it merely appears in the list; it is information given by the officials of the Foreign Office to the sheriffs for their own convenience and protection. When the Foreign Office is asked by the Court to give

information, then I apprehend that the position is a different one. The responsibility of the Foreign Office is entirely different, and it is then a question of examining into the matter in order to give the Court what I apprehend and am prepared to argue is conclusive information on that particular matter."

Then, after referring to the certificate from the Foreign Office given by Mr. Speguy, an Assistant Under-Secretary of State, stating that Engelke was one of the persons whose name was returned to the Foreign Office "as composing the diplomatic establishments and households of the Embassy or Legation," the Attorney-General continued:—

"In fact the document is quoted in italics because it is the heading of the alphabetical list of the foreign embassies and legations which is published pursuant to the Statute of Anne. That is why that particular phraseology is used. But I think it right, having regard to the nature of the controversy, not to rest satisfied with the mere statement that it was in this list, and I have myself communicated with the Foreign Office, and I have ascertained and I accept, and therefore I am able to say I have satisfied myself, that the information that I have given to your Lordships is the correct statement of this gentleman's position at all relevant dates."

"This man performs some service on the right side of the line between consular service and ambassadorial service. The reason I put it in that way is this; it so happens that Germany in 1919, in common with some other countries, ceased to have a separate consulate and diplomatic service; the two are amalgamated in one department of the Foreign Office in Germany."

"His Majesty's Government are not prepared to accept the view that merely because for convenience, or economy of administration, Germany has chosen to amalgamate those two departments she is thereby entitled to claim immunity for persons who perform purely consular functions. That is a view which His Majesty's Government does not accept, and we have rightly or wrongly taken the view that in order to support a claim for diplomatic immunity, the person claiming

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that immunity must be one of the diplomatic staff of the Embassy; but assuming that a person be a member of the diplomatic staff and performing diplomatic functions, such, for instance, as those of a commercial secretary or attaché, then the fact that he also by virtue of this amalgamation performs some consular duties does not in the view of the Government of His Majesty or the Foreign Office deprive him of the immunity which he possesses by reason of his diplomatic character, and there is authority for that view."

"He not only has that very confidential information as to the cipher for coding and decoding telegrams, but he also necessarily has the even more confidential, or at any rate equally confidential information, as to what the German Embassy is reporting to its Government and what instructions the Government is sending to the German Embassy, because he necessarily has the telegram in order to code it or decode it, so that his functions are in the highest degree confidential."

Pritt K.C. and *W. T. Monckton* for the appellant. The appellant is entitled to the protection of diplomatic privilege. There is no question of mixed consular and diplomatic character in this case, because the Foreign Office has accepted him as being on the staff of the German Ambassador. We have not been able to discover any case in which a man claiming diplomatic privilege has been cross-examined on his affidavit.

[LORD HANWORTH M.R. Mr. Attorney, we think that the convenient course will be for you to give the information to the Court which you have to offer, in order that we may have the full information and the materials on which to decide the appeal.]

Sir Douglas Hogg A.-G. and *M. N. Drucquer* for the Crown.

[After the Attorney-General had made the statement above set out he referred to the following propositions and authorities.]

Consuls are not entitled to diplomatic privilege: per Lord Mansfield in *Heathfield* v. *Chilton* (1) and per Lord

(1) (1767) 4 Burr. 2016.

Ellenborough in *Viveash* v. *Becker* (1); but the suite of an ambassador and his retinue are entitled to the privilege: Foote's Private International Law, 5th ed., pp. 205, 216; Satow's Diplomatic Practice, p. 261; *Assurantie Compagnie Excelsior* v. *Smith* (2), where a clerk in the United States Embassy in London was held to be entitled to the privilege. In *Hopkins* v. *De Robeck* (3) the secretary of a foreign minister was held to be so entitled, although his name was not registered at the office of either of the Secretaries of State.

A man who is entitled to the privilege because he is in the diplomatic service is none the less entitled to it if he happens also to perform consular functions: *Parkinson* v. *Potter*. (4)

Then the remaining question is whether the Foreign Office evidence, or the statement above set out and made by the Attorney-General after having discussed it with the Foreign Office, is conclusive. It is the settled practice of the Court to take judicial notice of the status of any foreign Government, and for that purpose, in any case of uncertainty, to seek information from a Secretary of State, and the information so received is conclusive: *Mighell* v. *Sultan of Johore* (5); *Foster* v. *Globe Venture Syndicate* (6); *Duff Development Co.* v. *Kelantan Government* (7); and "when information is so obtained the Court does not permit it to be questioned by the parties": per Viscount Cave L.C. (8) In the case of a diplomatic representative the Court, in recent years, has habitually obtained its information by application to the Foreign Office: *In re Suarez* (9), where Scrutton L.J. refers to "the Foreign Office, through whom this Court obtains conclusive information as to the status of foreign dignitaries and their accredited representatives to this country": *Luther* v. *Sagor & Co.* (10); *Fenton Textile Association* v. *Krassin*. (11) The law officers of the Crown are the

(1) (1814) 3 M. & S. 284.
(2) (1923) 40 Times L. R. 105.
(3) (1789) 3 T. R. 79.
(4) (1885) 16 Q. B. D. 152.
(5) [1894] 1 Q. B. 149.
(6) [1900] 1 Ch. 811.
(7) [1924] A. C. 797.
(8) Ibid. 805, 806.
(9) [1918] 1 Ch. 176, 199.
(10) [1921] 3 K. B. 532.
(11) (1921) 38 Times L. R. 259.

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appropriate channel to convey the information to the Court: *The Gagara.* (1)

On the above grounds, we submit that the right course, if the Court is in any doubt as to the defendant's position, is to ask His Majesty through His Majesty's proper department whether the defendant is recognized by His Majesty's Foreign Office or not, and if the Court has found what the position taken up by the Crown is as regards recognition, that is a matter which is conclusive so far as this Court is concerned.

H. M. Giveen and *J. B. Blagden* for the respondent. This is an action on a lease granted by the respondent to the appellant, who now claims ambassadorial privilege. The appellant made an affidavit, and the question is whether he can make use of it and then claim to be exempted from cross-examination upon it. We do not dispute that ambassadors and their suites are, but consuls are not, entitled to the privilege, or that this appellant may have ambassadorial duties; but if he has he must satisfy the Court that he is so entitled. Before the Court will allow the immunity, it has to satisfy itself, not by hearsay evidence of the executive Government, that he is within the privilege. It would be a very strong thing to allow this man to enter into obligations in England, as in this case to take a lease, as Consul-General, and for him then to file an affidavit to say he is not and refuse to be cross-examined on his duties, on the ground that that would be cross-examining a diplomat.

The fact that a person's name has been supplied by an ambassador and placed by the Foreign Office on the list issued by the Foreign Office to sheriffs under the Statute of Anne is not sufficient by itself to entitle that person to diplomatic immunity. It is not disputed that if it is properly proved that a person performs ambassadorial duties he is entitled to immunity. On the other hand if the duties performed by him are consular he is not so entitled. It is true that in form the present application is interlocutory, and therefore the Court has a discretion in the matter; but if the plaintiff fails in his application the result so far as his

(1) [1919] P. 95.

action is concerned will in effect be final. The Court must therefore consider the matter very carefully before it comes to a decision upon it.

It is not suggested by the defendant that the case is one which falls within the class of cases relating to sovereign States or ambassadors. What is suggested is that the defendant performs duties at the German Embassy which entitle him to immunity. On this point the Foreign Office can have no knowledge whether the duties he is performing bring him within the exemption. The matter is not one which can be proved by the Attorney-General.

[LORD HANWORTH M.R. referred to the dictum of Lord Mansfield in *Heathfield* v. *Chilton* (1) as to the action of the Attorney-General.]

That shows that the man must be rendering ambassadorial services at the time of the issue of the writ.

The Diplomatic Privileges Act, 1709 (7 Anne, c. 12), provides machinery which has been used ever since the passing of that Act. The lists referred to in s. 6 must be recognized by both the Governments concerned, but such recognition is by no means conclusive. In *Darling* v. *Atkins* (2) the protection of an ambassador to his English secretary was disallowed, because it appeared that he was a purser of a ship of war, the office of purser being considered incompatible with that of an ambassador's servant. In *Wigmore* v. *Alvarez* (3) it was held that it was not sufficient that a man should be recognized by both States to entitle him to exemption, but that his right to it must be proved to the satisfaction of the Court.

In the present case it is submitted that the intervention of the Attorney-General ought to be disregarded.

[Lord Hanworth M.R. The Attorney-General was here acting after investigations made by himself.]

In *Novello* v. *Toogood* (4), where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings, it was held that

(1) 4 Burr. 2016, 2017.
(2) (1769) 3 Wils. 33.
(3) (1731) Fitz-G. 200; 2 Stra. 797.
(4) (1823) 1 B. & C. 554.

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his goods, not being necessary for the convenience of the ambassador, were liable to be distrained for poor rates: see also *Delvalle* v. *Plomer*. (1)

[SCRUTTON L.J. referred to *Malachi Carolino's Case*. (2)]

It is contended by the Attorney-General that in the present case the Court can only adopt the procedure followed in *Duff Development Co.* v. *Kelantan Government* (3), that is to accept the certificate of the Foreign Office as conclusive. It is submitted, however, that it is not sufficient to show that the defendant is on the Foreign list, and that the certificate of the Foreign Office is not conclusive. It must be clearly shown that the defendant is in the actual and bona fide service of the ambassador: *Fisher* v. *Begrez*. (4) The matter is one for cross-examination of the defendant on his affidavit: *Seacomb* v. *Bowlney* (5); *Darling* v. *Atkins* (6); *Parkinson* v. *Potter*. (7) If the Attorney-General is right in his contention the Court ought not to have considered the affidavits in *Assurantie Compagnie Excelsior* v. *Smith*. (8)

The Courts have always been studious to protect plaintiffs against the assertion by defendants of exemption in order that their rights should not be taken away: *Fountainier* v. *Heyl*. (9) As to the extent to which the privilege of exemption is accorded see *Poitier* v. *Croza*. (10)

At one time during the argument it was sought to draw a distinction between a statement made by the Attorney-General and one made by the Foreign Office, but it is submitted there is no such distinction. In either case it is merely the case of a servant of the Government giving information to the Court.

This is a border line case, and one in which it is essential that there should be cross-examination of the defendant as to the nature of his duties. There is no rule which exempts a person who has put in an affidavit from being cross-examined on it. It was contended that under Order XXXVIII.,

(1) (1811) 3 Camp. 47.
(2) (1744) 1 Wils. 78.
(3) [1924] A. C. 797.
(4) (1832) 1 Cr. & M. 117.
(5) (1743) 1 Wils. 20.
(6) 3 Wils. 33.
(7) 16 Q. B. D. 152.
(8) 40 Times L. R. 105.
(9) (1765) 3 Burr. 1731.
(10) (1749) 1 W. Bl. 48.

r. 1, a defendant who claimed diplomatic privilege could not be cross-examined on his affidavit. Until the passing of the Common Law Procedure Act, 1854, there could be no cross-examination on affidavits, and the matter is not therefore dealt with in the earlier practice books: Tidd's Practice, 9th ed., c. xix., p. 478; Lush's Practice, ed. 1856, c. ix.

Magdalena Steam Navigation Co. v. *Martin* (1) was tried on demurrer. There was therefore no conflict of facts and no cross-examination was necessary. In *Macartney* v. *Garbutt* (2) it does not appear whether there was any conflict of facts. The same was the case in *In re Republic of Bolivia Exploration Syndicate* (3) and *Assurantie Compagnie Excelsior* v. *Smith.* (4) In *The Jupiter* (5) cross-examination was allowed by the Master.

Pritt K.C. in reply. The Court has a discretion as to whether it will direct the defendant to be cross-examined on his affidavit. The evidence shows that he was engaged in functions which were not consular. Commercial attachés are employed by every European nation. It is not suggested here that the transference of consular functions to the ambassador carried with it exemption to persons engaged in consular duties. If it be right for the Court to accept the statement of the Attorney General as to the position occupied by the defendant at the Embassy, it is useless to say that he must have obtained his information from some one else. The main question in this case is, Is the certificate of the Foreign Office conclusive on the matter? It is admitted by the plaintiff that this method of obtaining information is right as regards sovereign States and ambassadors, and the question is whether it is right as regards other persons. The privilege in question is one which is granted to the ambassador himself and cannot be waived by the member of his suite against whom the action is brought without the consent of the ambassador. If the defendant were allowed to be cross-examined he would be cross-examined as to

(1) (1859) 2 E. & E. 94.
(2) (1890) 24 Q. B. D. 368.
(3) [1914] 1 Ch. 139.
(4) 40 Times L. R. 105.
(5) [1924] P. 236.

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functions performed by him with reference to the business of the Embassy.

As regards the cases relied upon by the plaintiff many of them had reference to the issue of writs of fi. fa., others were cases which dealt not only with persons who claimed the privilege but also with their goods.

[LORD HANWORTH M.R. referred to the statement of Lord Sumner in *Duff Development Co.* v. *Kelantan Government* (1) as to the conclusiveness of the statement of the Foreign Office.]

If the statement of the Foreign Office is not conclusive it is a statement to which the Court must attach very great weight. Here the Foreign Office were perfectly satisfied that the defendant was not performing consular duties.

As to the extent to which diplomatic privilege may be waived see *In re Republic of Bolivia Exploration Syndicate.* (2)

The consideration of the question whether a diplomat should be cross-examined is a greater interference with his liberty than allowing the action to proceed against him: *Magdalena Steam Navigation Co.* v. *Martin.* (3)

Before the Court can make an affirmative order that a defendant should attend for cross-examination it should satisfy itself that he is not a diplomat.

[SCRUTTON L.J. Here the defendant comes forward and makes a statement which is to be used in Court.]

Whether or not such orders have been made before *Parkinson* v. *Potter* (4) is no authority as to what should be done in a case which does not arise in a county court. In that case the diplomat was not a party to the action and did not give evidence.

Cur. adv. vult.

June 23. The following written judgments were delivered :—

LORD HANWORTH M.R. stated the facts as above set out and continued : The case was heard on April 11 and 12 and May 30 and 31. On the first of those days the Attorney-General attended, instructed by the Treasury Solicitor, to give

(1) [1924] A. C. 797, 826, 827.
(2) [1914] 1 Ch. 139.
(3) 2 E. & E. 94.
(4) 16 Q. B. D. 152.

information to the Court. The plaintiff in the action, respondent to the present appeal, contends that the defendant's duties were and still are consular in their nature, or at any rate of such an order that he is entitled to subject him to cross-examination in order to ascertain what his duties and position are, although he does not exclude the possibility that after the defendant's position has been ascertained, it may be found that he is entitled to diplomatic privilege, for Mr. Giveen does not dispute that if it is properly proved that the defendant does perform diplomatic duties, he is entitled to exemption. The appellant in this Court, the defendant in the action, contends that he has adduced materials, reinforced and amplified by the presence of and information given by the Attorney-General, sufficient to entitle him to that privilege without more inquiry.

It is not contended before this Court that the defendant would be entitled to diplomatic privilege if he is to be considered as a consul or merely performing consular duties. Such persons are not within the privilege: see *Heathfield* v. *Chilton* (1) and *Viveash* v. *Becker*. (2)

It is also clear that as to the status of a foreign potentate or foreign power the proper course is that the Court should apply to His Majesty's Government, and that in any such matter it is bound to act on the information given to them through the appropriate department. "Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance": see per Lord Finlay, *Duff Development Co.* v. *Kelantan Government* (3), and he adds (4): "There is no ground for saying that because the question involves considerations of law these must be determined by the Courts. The answer of the King, through the appropriate department, settles the matter whether it depends on fact or on law."

The same principle applies to the person of an ambassador to the Court of St. James'. Who is to determine who is

(1) 4 Burr. 2016.
(2) 3 M. & S. 284.
(3) [1924] A. C. 797, 813.
(4) Ibid. 815.

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the ambassador of a foreign country? Surely that must be decided upon information obtained from the Foreign Office, information that when received cannot be questioned in a Court of law. The ambassador is accredited to the Court of St. James' and is presented to and received by His Majesty. It is the home sovereign that has the power and right of recognition. The reasoning of Lord Dunedin in the above case then applies: "If our sovereign recognizes and expresses the recognition through the mouth of his minister that another person is a sovereign, how could it be right for the Courts of our own sovereign to proceed upon an examination of that person's supposed attributes to examine his claim and, refusing that claim, to deny to him the comity which their own sovereign had conceded?" (1)

The present case, however, is not easy to decide upon the above rules. The evidence before the Court offers ground for the contention that the defendant falls within the definition of a consul—a consular secretary—who was at one time employed at the office where the consular work of the German Government was centred, No. 21a Bedford Place. On the other hand, there is evidence that he is "exclusively employed on the staff of the Embassy and has no duties save on the said staff," and that he performs general duties which fall upon the staff of the Embassy, and in particular the coding and decoding of telegrams. This latter duty was taken as a test in *Parkinson* v. *Potter* (2), where it was held that diplomatic privilege, if otherwise to be conceded, was not lost because the diplomat was also a consul.

It is not claimed that the certificate of the Foreign Office, dated December 3, 1926, is conclusive. If the matter rested upon that certificate alone, further information might be required, even though it does appear to state that the defendant is accepted by the Foreign Office as being upon the staff of the German Ambassador, and recognition by the Foreign Office was accepted as establishing immunity in *Macartney* v. *Garbutt*. (3)

(1) [1924] A. C. 820. (2) 16 Q. B. D. 152, 159.
(3) 24 Q. B. D. 368.

Our attention was called to a number of cases where the question whether the claimant was entitled to diplomatic immunity was decided by the Court upon facts contained in the evidence before it. In *Darling* v. *Atkins* (1) a purser of a ship of war was held not to be a bona fide servant of an ambassador. In *Novello* v. *Toogood* (2), where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings, it was held that his goods in that house, not being necessary for the convenience of the ambassador, were not exempt from distress. In *Fisher* v. *Begrez* (3) the affidavits as to exemption fell far short of what was required to establish it. The decision in *Magdalena Steam Navigation Co.* v. *Martin* (4) was upon a demurrer, so the mode of ascertaining the fact that the defendant was a public minister did not arise. Lord Campbell, however (5), pointed out that what was to be avoided was "coactio" to the ambassador.

According to modern procedure cross-examination could and might be allowed to clear up the ambiguity as to the nature of the defendant's duties, which appears from the affidavits filed. Whether that course would be satisfactory may be doubtful. More facts might be elicited, and then it would become a question of law whether those facts justified the claim of privilege; and meantime, if privilege is ultimately accorded, the holder of it would have been subjected to processes from which the comity of international intercourse releases him. However, it may not be possible to avoid it, and the cases cited above seem to show that where doubts arise, and there is no special information afforded to the Court, its usual procedure must be followed, even though by s. 3 of the Statute of Anne all writs and processes against any public minister and his servants are to be adjudged utterly null and void. This must be so when a simple question of fact has to be decided, such as whether the person in question has, or has not, ceased to hold his position, and

(1) 3 Wils. 33.
(2) 1 B. & C. 554.
(3) 1 Cr. & M. 117.
(4) 2 E. & E. 94.
(5) 2 E. & E. 103, 114.

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ceased consequently, to preserve his immunity. But the immunity given by diplomatic privilege belongs to the ambassador or minister in whose service it is claimed. It is not the immunity of the particular individual. It is the ambassador who throws his cloak over his attaché or servant and all persons associated in the performance of the duties of the Embassy or Legation. As Wills J. said in *Parkinson* v. *Potter* (1): "It is not for (the Court) to measure the quantum of the services either required from or rendered by him," where no question of bona fides is raised.

As Lord Sumner says in the *Duff Development Co.'s* case (2) the Court must act on the best evidence. In reference to the status of a foreign ruler, he says (3): "It is the prerogative of the Crown to recognize or to withhold recognition from States or chiefs of States, and to determine from time to time the status with which foreign powers are to be deemed to be invested. This being so, a foreign ruler, whom the Crown recognizes as a sovereign, is such a sovereign for the purposes of an English Court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed." This reasoning would, in my opinion, apply to the evidence available if the question was, who is the ambassador of a foreign country accredited to this country?

Diplomatic immunity depends upon the comity of nations. It has often been said that the Statute of Anne was declaratory of the common law and did not alter it. How then is this immunity to be determined? It is clear that the Court could ask for and might be given information from a Secretary of State, which would then be authoritative and conclusive. In the present case the Attorney-General, moved thereto by the Foreign Office, has attended, and has in his own person informed the Court that the defendant has been, and is, recognized by the Foreign Office as a member of the suite of the German Ambassador. The Foreign Office might

(1) 16 Q. B. D. 152, 159. (2) [1924] A. C. 797.
(3) [1924] A. C. 824.

have made no intervention, or replied that it is a question of fact that they are unable to determine, and have left the matter to take its course in the King's Courts. But where it has definite information to give, and gives it, through the Attorney-General, who takes upon himself the responsibility of conveying that information, with full appreciation of the importance of that responsibility, I find it impossible to neglect or pass over such intervention and to hold that in spite of it, the matter is left in such uncertainty that cross-examination of the defendant ought to be ordered. There is before the Court the certificate from the Foreign Office dated December 3, 1926, signed by an Assistant Under-Secretary, to the effect that the defendant is one of the persons composing the diplomatic establishment and household and upon the staff of the German Ambassador.

This statement has been rendered unequivocal by the statement of the Attorney-General. What better evidence as to the status of the defendant could be forthcoming? If he were cross-examined, and the Master or judge or Court before whom the issue was to be determined came to the conclusion that the defendant was not entitled to diplomatic privilege, the divergence deprecated by Lord Dunedin in *Duff Development Co.'s* case (1) between the decision of the Courts and the comity extended by the department charged to exercise such in the name of His Majesty would become apparent.

In *In re Suarez* (2) the Foreign Office afforded information that the defendant had ceased to be the Minister of the Bolivian Government and had lost any title to diplomatic privilege. The certificate of the Foreign Office was treated as conclusive.

Luther v. *Sagor & Co.* (3) offers an illustration that the information supplied by the Foreign Office may not be conclusive, but informative only for the purpose of the Court deciding upon the materials supplied. But that case, and *Fenton Textile Association* v. *Krassin* (4), show that the

(1) [1924] A. C. 797, 820.
(2) [1918] 1 Ch. 176.
(3) [1921] 3 K. B. 532.
(4) 38 Times L. R. 259.

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source of information resorted to by the Courts upon the question of diplomatic status was the Foreign Office.

The presentment of the attitude of the Foreign Office by the Attorney-General was treated as correct and authoritative by the Court of Appeal in *The Gagara* (1), and in particular see the observation of Bankes L.J. (2), as to the effect of the deliberate statements of the law officers of the Crown, which, if not accepted and acted upon, would result in "a divergence of action as between the Courts of this country and the statements that have been made by the Government of the country as to the attitude which this country was prepared to take."

The Attorney-General has stated that his intervention in the present case has been dictated in view of that very possibility and because the German Ambassador made communications to the Foreign Office on behalf of one of his staff, the defendant, who has been recognized as such by that department, and he has claimed their assistance.

The view of Lord Mansfield as to such an intervention has been expressed in *Heathfield* v. *Chilton* (3): "I find this is not an application by the Attorney-General, by the direction and at the expense of the Crown. That, indeed, would have shown that the Crown thought this person intitled to the character of a public Minister." If obiter, that dictum is entitled to respect, and is in accord with the observations made in this Court quoted above. To act in accordance with such information thus conveyed is not a petitio principii, but to adopt the best evidence that can be adduced.

No doubt the Foreign Office and the Attorney-General undertake a serious responsibility in the adoption of this course. The Foreign Office will no doubt have considered that in so doing they might be depriving one of His Majesty's subjects of his ordinary right of suit against one whom he claims to be his debtor, and if the defendant is a debtor to the plaintiff the debt ought to be paid. But while representations might be made to the Foreign Office to withdraw

(1) [1919] P. 95. (2) [1919] P. 103, 104.
(3) 4 Burr. 2016, 2017.

their recognition from the defendant, or to represent to the German Ambassador that exception must be taken to one particular member remaining upon the staff, that does not alter the duty of the Court to act in accordance with the principle of the common law, and of the Statute of Anne, that so long as that recognition exists, international comity requires that effect should be given to it. This is the answer to the argument of Mr. Giveen, that the Foreign Office, or the Attorney-General, may be acting upon insufficient or even incorrect appreciation of the true facts. They need not take action. They might reject the appeal of an ambassador and refuse to intervene. They may submit the facts and leave the Court to draw the inference in law. But if with the responsibility upon them they do intervene and communicate to the Court the status of the diplomat through the Attorney-General, that evidence is conclusive, and, as Lord Sumner says: "Where such a statement is forthcoming no other evidence is admissible or needed." (1)

For these reasons in my judgment the appeal ought to be allowed and the order of the Master restored, but as I have the misfortune to differ from my colleagues the order of the Court will be that directed by Scrutton L.J.

SCRUTTON L.J. This case in form is only an appeal from a discretionary decision under Order XXXVIII., r. 1, that a gentleman who makes an affidavit in a pending proceeding shall be cross-examined on his affidavit. He appeals, alleging that such an order cannot be made against him, or at any rate that it ought not as a matter of discretion to be made.

Mr. Engelke's name appears in the Diplomatic List furnished by the English Foreign Office to sheriffs under s. 5 of the Act of Anne (7 Anne, c. 12). It appears in June, 1921, as assistant clerk, and so continues till 1924, when it appears as consular secretary. At some time since the war all or part of the consular service of Germany has been put under the control of the German Ambassador for the country in which the consular service exists. It appears that the

(1) [1924] A. C. 797, 824.

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German Government contends that as to the consular service so transferred it has now acquired a diplomatic immunity which as consular service it did not before possess. This was the first contention put forward by counsel for Mr. Engelke before Shearman J.; before us, another counsel appearing did not insist on this, though he said that the German Embassy attached great importance to the contention, but counsel argued that at any rate Mr. Engelke had diplomatic immunity. The Attorney-General informed us: "His Majesty's Government are not prepared to accept the view that merely because for convenience, or economy of administration, Germany has chosen to amalgamate those two departments, she is thereby entitled to claim immunity for persons who perform purely consular functions." Obviously, therefore, it is important that the exact facts as to Mr. Engelke's position should be ascertained to decide what his exact status is, and whether it confers diplomatic immunity.

Mr. Engelke appears to have rented a house in England. The landlord, Mr. Musmann, alleges that Mr. Engelke has not paid his rent and has broken the covenants of his lease. I understand Mr. Engelke to dispute these allegations, but to take the preliminary point that he is immune in England from any legal proceedings to ascertain whether he has broken his contract. He, however, offers, apparently seriously, that these questions as to whether an English contract as to a house in England made between persons in England, and depending on English law, shall be decided not by an English Court, knowing the English law, in the place where the witnesses are, but by a German Court, which does not know English law except as a question of evidence, in a place where the witnesses are not resident. I appreciate that it is desirable that diplomatic immunity should be maintained, and that the remedy for avoiding legal obligations may be complaint direct or through the English Foreign Office to the Government or Ambassador of the person claiming diplomatic immunity, but it can hardly be desirable that foreign subjects resident in England shall make contracts and then break them without effective remedy.

To understand the question before us it is necessary to state exactly what proceedings have been taken. On July 28, 1926, Musmann issued a writ, alleging that under a lease from him to Engelke, dated August 18, 1924, of premises at Hampstead, rent due had not been paid, and sums were due for dilapidations, and damages for premature termination of the tenancy. On August 12 the defendant took out a summons to set aside the writ on the ground "that the defendant is a consular secretary on the staff of the German Embassy in London since the 25th November, 1920, and has been notified as such to the British Foreign Office, and that the defendant's name appears in the Diplomatic List issued by the British Foreign Office." It now appears that it was not the fact that he was consular secretary between 1920 and some date in 1923 or 1924. The summons was supported by an affidavit by the solicitor for Mr. Engelke, who is also solicitor to the German Embassy, deposing that he was informed by the Embassy and believed that Engelke has been consular secretary since 1920 and had been notified as such to the British Foreign Office, and that his name appeared in the Diplomatic List issued by the Foreign Office, and exhibited a certificate from the German Chargé d'Affaires to that effect. As already stated, it now appears that both information and certificate were inaccurate, as Engelke was not consular secretary till some date in 1923 or 1924. On this summons and evidence Master Bonner on August 26, 1926, made the order asked for. An appeal was brought before Talbot J. on October 18, 1926, who after being referred to a number of decided cases reversed the Master, but gave the defendant leave to appeal, and in the alternative leave to renew the application on further evidence. The leave to appeal was not used, I think wisely. I understand Talbot J. to have decided on the earlier authorities that it is not enough to give immunity (1.) that the ambassador claims it for a dependent, or (2.) that the name of the defendant having been supplied by the ambassador is put by the Foreign Office on the list issued by the Foreign Office to sheriffs under the Act of Anne. I think the authorities

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referred to by Mr. Giveen support this view, and that to obtain immunity it must be proved that the actual position occupied by the defendant and the actual work done by him brings him within the class of servants or suite of the ambassador who are immune from legal proceedings, as distinguished from the consular staff, who are not. The description " assistant clerk " or " consular secretary " does not seem to elucidate the question. The correctness of Talbot J.'s decision is, however, not before us, as the defendant did not use the leave to appeal, but took out another summons on fresh evidence. This summons came before Master Moseley on December 9. Meanwhile Mr. Engelke had sworn an affidavit on November 3, repeating the inaccuracy about " consular secretary from 1920," and stating that he performed the duties which before the war were performed by the Consul-General, and other commercial matters, being answerable for his work to the German Ambassador, and that he also performed general duties, such as the coding and decoding of telegrams. Count Bernstorff also filed an affidavit. Thereupon the plaintiff gave notice on November 9 that he would apply for an order for cross-examination of Mr. Engelke and Count Bernstorff on their affidavits. The application was stated to be made under Order XXXVII., r. 20, which was apparently a mistaken reference to Order XXXVIII., r. 1. Count Bernstorff's affidavit was thereupon withdrawn. This application came before Master Moseley on December 9, when, we were informed, he took the view that without looking at the contents of the affidavits at all he would refuse to order cross-examination of the defendant. Against this refusal there was an appeal to Horridge J., who on December 20 remitted the matter to the Master to look at the affidavits and decide whether there should be cross-examination. When it went back the Master had before him the following material, which had not been before Talbot J., a certificate dated December 3 from the British Foreign Office that Mr. Engelke's name as returned by the German Ambassador to the Foreign Office appeared in the Foreign Office Lists of 1921, 1922 and 1923 as assistant clerk to the German

Ambassador, and in and since 1924 as consular secretary on the staff of the German Ambassador. It is not a certificate by the Foreign Office that Engelke does in fact hold such a position, or that such a position gives diplomatic immunity, even if such a statement is admissible. This had produced a second affidavit of Mr. Engelke (1.) correcting the mistakes in his previous affidavit and (2.) setting out that the duties performed before the war by a consul or consul-general were now performed by the German Ambassador and his staff "in all cases where a German Ambassador is appointed," a statement the exact meaning of which is not very clear; that he is employed as a member of the staff of the commercial department of the Embassy and assists the ambassador in his work in regard to all commercial matters. He does not repeat the statement about coding and decoding telegrams. There was also an affidavit by Mr. Musmann deposing that up to some time in 1926 the German Embassy carried on work at Carlton House Terrace and that the consular work was carried on at 21a Bedford Place, and that Mr. Engelke was employed at 21a Bedford Place, and suggesting that if the defendant is now at Carlton House Terrace, it is because his consular work has been transferred from Bedford Place. On these materials Master Moseley refused on February 15 to allow cross-examination, and appeal was made to Shearman J. Mr. Bevan for Mr. Engelke argued as his first proposition that now that consular duties were performed by the ambassador all members of the consular staff had ambassadorial privileges. The learned judge allowed the appeal and ordered the defendant to appear for cross-examination, taking the view as I understand that the claim of privilege was so important that the exact facts as to work done should be established, and that this could best be done by cross-examining the witness on the affidavit he proposed to use. From this order an appeal was made to this Court, which is the matter for decision.

The position before this Court was different in two respects. First, Mr. Pritt now appearing for Mr. Engelke did not take the broad position that all consular servants, when transferred

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to the control of the ambassador, had diplomatic immunity, though they were not immune before the transfer. Though, he said, the German Embassy attached great importance to this position, he as counsel took the responsibility of basing his arguments on the facts relating to this particular case. Those facts of course were what cross-examination was intended to ascertain. But secondly, something happened of much more importance as a general question. The Attorney-General appeared and made a statement to the Court. It was not a case where, as in the case of questions as to an "independent sovereign," the Court had asked for information from the best source of information and treated it as conclusive. In this case the German Ambassador approached the Foreign Office, who thereupon instructed the Attorney-General to attend and give the Court information, which appears on p. 26 of the shorthand notes. (1) The President of the Court thereupon asked the Attorney-General whether he himself was satisfied as to the information he had given. He answered that he derived his information from the appropriate department to give him information, and he adopted it as Attorney-General. It appears on p. 29 that the information was to the effect that while the Foreign Office did not accept the position that all consular servants, if under the control of the ambassador, had diplomatic immunity, the Foreign Office had investigated the line between consular service and ambassadorial service and were satisfied that Engelke did some service on the "right side of the line." The Attorney-General agreed that the fact that the defendant was on the Diplomatic List was not conclusive.

I am not at all satisfied that this procedure was admissible, still less that it is conclusive. In certain matters, notably the status of sovereigns, or of ambassadors, their representatives, the Courts are accustomed to seek information from the Secretaries of State as representing the King and to accept a definite answer as conclusive. I refer to the recent judgments of the House of Lords in the *Duff Development Co.* v. *Kelantan Government*. (2) There was a difference

(1) Set out ante. (2) [1924] A. C. 797.

of opinion between Lord Finlay and Lord Sumner as to whether the same principle applied to the boundaries of foreign States, and I respectfully refer to the very instructive remarks of Lord Sumner on the subject. But I am not disposed to enlarge the class of cases coming within this rule of practice. The Crown and Government know whom they have recognized as independent sovereigns, though the actual facts in the *Kelantan* case (1) do not strengthen one's belief in the efficacy of the Courts' procedure in eliciting the real position. They know whom they have received or ceased to receive as an ambassador: *In re Suarez.* (2) But the Foreign Office appear to have no knowledge of the internal arrangements of an Embassy, as for instance whether a particular person is a chorister or a cook, or what exact work he does, except such as they derive from statements by the ambassador or his representatives. To say that a British subject, suing on a British contract, is to be deprived of his right to enforce his contract in a British Court, because a department of the Government holding an inquiry not on oath and at which the plaintiff is not represented has arrived at a conclusion that the defendant has immunity from process, and without being asked by the Court for information, instructs the Attorney-General to inform the Court of the conclusion at which the department has arrived, without the plaintiff's having an opportunity of questioning the decision or ascertaining the facts for himself, in my opinion is a most unsatisfactory position and not warranted by any authority. It appears to be admitted that a mere claim by an ambassador that a particular person is privileged, even if the name of that person is put on the Diplomatic List, is not conclusive. There are Embassies and Embassies; a statement by Embassy A may have different weight from one by Embassy B; the Courts must decide each case on the evidence, and obviously cannot say, "We will accept all statements by all accredited representatives of States as conclusive." If very recent events did not show the impossibility of that position, a reference to the odd claims made unsuccessfully in old cases

(1) [1924] A. C. 797. (2) [1918] 1 Ch. 176.

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by various minor Embassies and their staffs will prove it. I am quite unable to accept the Attorney-General's statement as to the result of the Foreign Office investigation as binding and conclusive on this Court. To do so would be to substitute a department of the Government for the Courts in a class of case where such substitution has never hitherto been recognized. I do not find any case where the Court has asked the Foreign Office for information as to the position of the servant of an Embassy, or where the Attorney-General has attended to give the Court such information, and I am not disposed to make a precedent.

What then is the position? The consular service has never hitherto been granted the immunity which applies to the diplomatic service. I am not inclined at present to accept the position that the transfer of control to the ambassador confers that immunity on the officials transferred. I quite realize that a transferred official may have sufficient diplomatic work given him to confer on him diplomatic immunity. I am inclined to think that a colourable or slight transfer would not be sufficient, if his principal work was consular. I do not think it desirable to extend the class of persons in a country who can disregard the laws without legal consequences. But I should wish to decide any question of the position of a former consular official with full knowledge of the relevant facts. It appears to me that cross-examination on general statements is one of the best means of getting at the exact truth. I see no danger that the Court will allow cross-examination that will drag out diplomatic secrets, and I regard as fantastical the suggestion that Mr. Engelke could be compelled to disclose the contents of any particular cipher telegram he alleges he sent.

The case strikes me in this way: Mr. Engelke occupies a position, the exact effect of which depends on the facts of his service. To give him immunity it is necessary accurately to ascertain these facts. He files two affidavits containing general statements, and one of them containing a substantial and careless inaccuracy. It appears to me to be most desirable to test the generality of his statements

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by the cross-examination, to which any person who makes an affidavit is liable. Once you accept that a mere claim by him or his ambassador is insufficient, it follows that the accurate facts must be ascertained.

I am not deciding that Mr. Engelke is not entitled to immunity; it is very possible that when the facts are ascertained by regular methods he will be held immune. In that case it is to be hoped that the ambassador will satisfy himself that one of his staff has not inflicted a legal wrong on a citizen of the country to which he is accredited, for which wrong there is no legal redress in that country. What I am deciding is that the question of immunity shall be only decided after the relevant facts have been ascertained in the usual way, and that cross-examination of a person who makes an affidavit is in this case necessary for that end. It might be enough to say that Shearman J. used his discretion, and there being no relevant change of facts I cannot interfere with it, but as I have come to the same conclusion as Shearman J., I think it my duty to express it. The appeal in my opinion should be dismissed with costs in any event.

SARGANT L.J. I have had an opportunity of considering the judgment that has just been read by Scrutton L.J. and I agree with it.

Appeal dismissed.

Solicitors for appellant: *Buckeridge & Braune.*

Solicitors for respondent: *Waterhouse & Co.*

Solicitor for Crown: *Treasury Solicitor.*

W. I. C.

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[IN THE COURT OF APPEAL.]

INLAND REVENUE COMMISSIONERS *v.* PAKENHAM AND OTHERS.

INLAND REVENUE COMMISSIONERS *v.* COUNTESS OF LONGFORD.

Revenue—Super Tax—Assessment—On Trustees of Settlement—On Guardian of Infant—Representative Capacity—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 41—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 72, *sub-s.* 6 —*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *ss.* 4, 5, 7, *General Rules applicable to All Schedules*, *r.* 4.

Where property is held by trustees under a settlement or will in trust for an infant so that the whole of the income of the property, or the residue of the income after the application of part thereof for the infant's maintenance, education or benefit, is to be accumulated, assessments to super tax cannot be made under s. 41 of the Income Tax Act, 1842, and s. 72, sub-s. 6, of the Finance (1909–10) Act, 1910, or under s. 7, sub-s. 6, of the Income Tax Act, 1918, and r. 4 of the General Rules applicable to All Schedules, upon the trustees or upon the guardian of the infant in a representative capacity in respect of the total income of the infant.

So *held* by the Court of Appeal (Lord Hanworth M.R. and Scrutton L.J.; Sargant L.J. dissenting as regards the case of trustees).

Decision of Rowlatt J. [1927] 1 K. B. 594 affirmed.

APPEALS from two decisions of Rowlatt J. (1) upon cases stated by the Commissioners for the Special Purposes of the Income Tax Acts.

INLAND REVENUE COMMISSIONERS *v.* PAKENHAM AND OTHERS.

The facts of this case as appearing in the case stated were as follows :—

1. At a meeting of the Commissioners held on May 27, 1921, for the purpose of hearing appeals the Hon. G. M. Pakenham, G. F. Stewart and H. N. Walford (hereinafter called " the respondents "), appealed against assessments to super tax made upon them as trustees of the Right Hon.

(1) [1927] 1 K. B. 594.

the Earl of Longford (a minor) for the years specified under the provisions relating to super tax.

	In the amount of
For the year ended April 5, 1918 . .	16,000*l.*
,, ,, ,, April 5, 1919 . .	16,500*l.*
,, ,, ,, April 5, 1920 . .	26,000*l.*

2. The said Right Hon. the Earl of Longford (hereinafter called "the Earl") was the sixth Earl, and was at the time of the hearing of the appeal an infant, having been born on December 29, 1902. The Countess of Longford, his mother, was during his infancy his guardian.

3. By a settlement made on August 22, 1899, the Right Hon. Thomas fifth Earl of Longford, father of the Earl, conveyed certain real estates in Ireland to trustees upon trusts under which upon his own death, which occurred on August 21, 1915, his son (the Earl) became tenant in tail male. The said settlement contained no express power of management during minority nor did it contain any direction that the statutory provisions were not to be applied. The trustees thereof were by the said settlement appointed trustees for the purposes of s. 42 of the Conveyancing Act, 1881. At the time of the late Earl's death the property settled consisted, and it had since that date consisted, partly of realty and partly of personalty, which represented the investment of proceeds of sales of realty. The trustees of this settlement were the persons named in the assessments appealed against.

4. By a settlement dated November 8, 1862, certain property referred to as the Bedfordshire Estates was settled by the grandmother of the Earl, the Hon. Selina Rice Trevor, upon her marriage with the fourth Earl of Longford. By this settlement the estates were limited (subject to a term for raising pin money during the joint lives of the spouses) to the use of the then Earl for life, with remainder to the use of the said Selina Rice Trevor for life, with remainder to the use of the first son of the marriage in tail male, with divers remainders over as therein provided. The settlement contained a clause directing the trustees to enter and receive

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and apply the rents and profits during minority and the trustees were given powers of management and subject thereto were to apply such sums as they should think fit to the maintenance of the infant and to accumulate the surplus, such provisions being limited to the minority of any son of the intended or any future marriage of the said Selina Rice Trevor. The trusts of the accumulations were if the son should attain twenty-one or die under that age leaving inheritable issue for the son; but if he should die under twenty-one without such issue then upon trusts as capital money. It was also provided that the provisions of the minority clause (originally made applicable only to the minority of a son of the said Selina Rice Trevor) should apply, so far as they were or could be made applicable, to the minority of any person who would for the time being be entitled under the settlement to the rents and profits. In the events which happened the Earl, upon the death of his grandmother the said Selina Dowager Countess of Longford on January 22, 1918, became tenant in tail of these estates.

The trustees of this settlement were not the same persons as the trustees of the settlement of August 22, 1899.

5. After the Earl became entitled to the estates the subject of the settlement dated August 22, 1899, the trustees of that settlement paid yearly during his minority a sum of 2500*l.* for his maintenance, and after the Earl became entitled to the estates the subject of the settlement dated November 8, 1862, the trustees of that settlement paid yearly during his minority a sum of 500*l.* for his maintenance. The balance of income arising from both estates had been accumulated.

6. During the year 1919 correspondence took place between the Special Commissioners of Income Tax and the guardian of the Earl with regard to the super tax liability of the income of the Earl, and the Countess of Longford having been called upon as guardian of the Earl to make a return for the year ended April 5, 1917, and having failed to do so, an estimated assessment to super tax was made on her by the Special Commissioners for that year with the intention of bringing

into assessment the total income of the previous year of the Earl from all sources, including the whole income arising from the estates the subject of the said settlement of August 22, 1899, but not the income arising from the estates the subject of the settlement of November 8, 1862, the Earl not having become entitled to such estates until January 22, 1918.

7. At a later date in consequence of the said correspondence the Special Commissioners served notices to make returns of the total income of the Earl from all sources for super tax purposes for the years ended April 5, 1918, April 5, 1919, and April 5, 1920, on the respondents. These returns were in due course made by H. N. Walford on behalf of himself and co-trustees. In such returns of the Earl's total income there was included as the income of the Earl arising from both the said two settled estates each year only the sums paid by the respective trustees of both settlements for maintenance in the respective previous years. The above assessments to super tax, the subject of the present case, were subsequently made on the respondents as trustees of the Earl for the years ended April 5, 1918, April 5, 1919, and April 5, 1920, with the intention of including therein each year the total income of the Earl from all sources for the respective previous years including the whole income arising from both estates, whether used for maintenance or accumulated, but only as regards the income from the estates the subject of the settlement of November 8, 1862, from the time at which the Earl succeeded thereto.

9. At the hearing of the appeal, which was heard together with an appeal by the Countess of Longford against the said super tax assessment for the year ended April 5, 1917, mentioned in para. 6 hereof, counsel on behalf of the respondents referred to the correspondence which had passed relative to making the assessments, and contended that it was open to him to object in toto to assessments being made upon the trustees of the settlement of August 22, 1899.

In the alternative he contended :—

(*a*) That the Countess of Longford was not liable to any assessments as guardian for any year ;

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(*b*) That by virtue of s. 43 of the Conveyancing Act, 1881, the Earl was not entitled under the settlement of August 22, 1899, to receive more than the sums allowed to him for maintenance under that settlement, and that by the provisions above referred to of the settlement of November 8, 1862, he was assessable on the same principle as regards the income of that settlement.

(*c*) That the trustees of neither settlement were (apart from any submission which they might be deemed to have made in the correspondence above referred to) under any obligation to make any super tax returns on behalf of the appellant.

10. On behalf of the Commissioners of Inland Revenue it was contended (inter alia) :—

(*a*) That the respondents were liable to be assessed to super tax in respect of the total income from all sources of the Earl.

(*b*) That such total income included for the purposes of super tax for each of the three years ended April 5, 1920, the whole income arising during the respective previous years (1.) from the estates the subject of the settlement of August 22, 1899, and (2.) from the estates the subject of the settlement of November 8, 1862, from the date at which the Earl succeeded to such latter estates.

(*c*) That the trustees were liable to make super tax returns of the income of the Earl.

(*d*) That the assessments were in principle correctly made and should be confirmed subject to any necessary adjustment of figures.

11. The Special Commissioners who heard the appeal gave their decision in this and the appeal referred to in para. 9 hereof together as follows :—

"We have read the correspondence relative to the making of the assessments for the years subsequent to the year 1916–17 and we have formed the view that the trustees are debarred from objecting to the form of the assessments, so

far and so far only as the minor is liable either through his trustees or his guardian to assessment to super tax.

"As regards the liability through the guardian, who is herself assessed for the year 1916–17, we hold that it is restricted to so much of the income of the minor as passes through her hands. The authority for assessing her in respect of his income is contained we think in the case of *Drummond* v. *Collins* (1), notwithstanding that she has not the 'direction, control or management' of the property from which the income issues. Upon the amount allowed or expended for the maintenance of the minor in the year 1915–16 being stated, we are prepared to adjust the assessment for 1916–17 accordingly. For years subsequent to 1916–17 for which the trustees are assessed they are liable in our opinion as already stated to the same extent at any rate as the guardian is or would be liable, but we have to decide the further question whether the balance of the income of the estates which is being accumulated should be assessed for these years. Three points are contended for on behalf of the minor:—

"(1.) that neither guardian nor trustees are under any obligation to make a return of the balance of income in question and that the Special Commissioners have no power to make an assessment except upon a return, or upon a failure to make a return, which has been legally demanded, from a person who is liable to make it.

"(2.) that the balance of income in question is not receivable by the minor within the meaning of the Finance (1909–10) Act, 1910, s. 66, sub-s. 2 (*d*), and

"(3.) that the income from the estates so far as it is being accumulated is not vested income of the minor.

"We have not found it necessary to make up our minds as to the effect of the deeds on the last point and we only think it right to observe about it that our decision will leave it open to the assessing Commissioners to make an assessment

(1) [1915] A. C. 1011; 6 Tax Cas. 525.

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upon the Earl upon the whole of the accumulation as soon as he comes of age.

"As regards the first of the two other points we have already given our opinion upon the liability of the guardian. Dealing with the trustees, who have the control and management of the property, the question to be decided is whether they can be charged with sufficient knowledge enabling them to make a return. Were it not for the definite decision which we have arrived at on the second point we might have had some doubt as to what we ought to decide on this point owing to the various remarks made by the judges in the case of *Brooke* v. *Inland Revenue Commissioners* (1) to the effect that a trustee might be required to make a partial super tax return. These dicta in their entirety do not seem to us in themselves a necessary part of the judgment of which they form part, though it was necessary for the purpose of those judgments to give some meaning to the words of the Super Tax Act relating to returns by the incapacitated and non-resident persons. Such a meaning in the case of the present minor is found in the liability of the guardian to be assessed for the maintenance money. The return prescribed for the purpose of super tax is, however, a return of the total income and we do not, therefore, see (apart from the authority of the dicta referred to), especially as regards the year in which the minor has an interest in two estates, how the assessing Commissioners can require returns in this form from either body of trustees. It seems to us, with due respect to those remarks, that the trustees' duties begin and end with the administration of the estate, and that since the liability of the minor to super tax does not depend on the estates but upon his total income from the estates and all other sources the trustees are not liable to make the returns nor do we see how, if they must make the partial return referred to, there is authority to make assessments upon them.

"As regards the second point, inconvenient as it will undoubtedly prove, we are bound, we think, to decide that income of a minor which is being accumulated by trustees

(1) [1918] 1 K. B. 257; 7 Tax Cas. 261.

is not receivable by the minor. The history of the provisions relating to such accumulation whether under express deed or implied by statute is a long one, but it is governed throughout by the one dominating consideration that the minor is not for the time being to be allowed to receive the money, and we cannot, therefore, in our opinion say that it is liable to present assessment to super tax."

The Special Commissioners accordingly, there being consent between the parties to the appeal as to the amount of income to be returned under their decision, discharged the assessment for the year ending April 5, 1917, and reduced the remaining assessments as follows :—

For the year ending April 5, 1918, to 3333*l.*
" " " April 5, 1919, to 3333*l.*
" " " April 5, 1920, to 4285*l.*

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At a meeting of the Commissioners held on May 27, 1921, for the purpose of hearing appeals the Countess of Longford appealed against an assessment to super tax made upon her as guardian of her son, the Right Hon. the Earl of Longford (a minor), for the year ended April 5, 1917, in the sum of 12,000*l.* under the provisions relating to super tax.

This appeal was heard together with the appeals by the Hon. G. M. Pakenham, G. F. Stewart, and H. N. Walford against assessments to super tax made upon them as trustees of the Earl for the three years ended April 5, 1920, and the facts and contentions in this appeal were substantially the same as in that appeal and are therefore not set out separately.

The decision of the Commissioners in this case was given together with their decision in the appeal of the trustees, and is set out in that case.

The Commissioners accordingly, there being consent between the parties to the appeal as to the amount of income to be returned under their decision, discharged the assessment for the year ending April 5, 1917, the total income of the Earl

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from all sources for the year ended April 5, 1916, on the basis of the Commissioners' decision being below the total income upon which super tax was payable for the year ended April 5, 1917.

Rowlatt J. upheld the decision of the Commissioners, holding that the assessments to super tax could not be made under s. 7, sub-s. 6, of the Income Tax Act, 1918, and r. 4 of the General Rules applicable to All Schedules upon the trustees or upon the guardian of the infant in a representative capacity in respect of the total income of the infant.

The Crown appealed. The two appeals were heard together on July 7, 8, 11, 1927.

Sir Douglas Hogg A.-G., *J. H. Stamp* and *R. P. Hills* for the appellants. There is no decision that trustees are not liable to make a return, and the question is whether the guardian and trustees can be assessed to super tax in a representative capacity, under s. 41 of the Income Tax Act, 1841, s. 72, sub-s. 6, of the Finance (1909–10) Act, 1910, or under r. 4 of the General Rules of the Act of 1918, to the full amount of the income of the minor or beneficiary. It is submitted that they can be so assessed (*a*) whether in fact the total income is paid into the hands of the guardian, or is received by the trustees from the trust which they administer or from a trust or trusts not under their control, or (*b*) alternatively, whether the total income received by the trustees is or is not immediately payable to and enjoyed by the minor, or is in part accumulated for his ultimate benefit when of full age.

Sect. 72, sub-s. 2, of the Finance (1909–10) Act, 1910, requires every person served with notice to make a return who is chargeable with or liable to be assessed to income tax under s. 42 of the Act of 1842, as representing an incapacitated or non-resident person, and sub-s. 6 relates to the same persons as are referred to in sub-s. 2, and when they have made the return they can be assessed to super tax in respect of the income of the person for whom they are trustees. The trustees of a will under which a non-resident derives income

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are within s. 41 of the Act of 1842, and are required to make a return for super tax: *Brooke* v. *Inland Revenue Commissioners*. (1) Notice under s. 72, sub-s. 2, can be served by post abroad on a non-resident: *Inland Revenue Commissioners* v. *Huni* (2), and that assumes that a non-resident can be assessed in the name of an agent by virtue of s. 41 of the Act of 1842. That decision was approved in *Whitney* v. *Inland Revenue Commissioners*. (3) Those cases and also the illustrations to be found in *Williams* v. *Singer* (4) show that it is clear that the machinery of s. 41 can be applied for purposes of super tax and that non-residents can be assessed through a trustee, representative or agent in this country. Sect. 41 states plainly that any one chargeable under that section may be required to make a return; and s. 72 of the 1910 Act brings in that machinery for the purposes of super tax, and sub-s. 6 shows on whom the assessment is to be made. Further, the trustees cannot limit themselves to a return of the amounts which they have received, but they are liable to super tax on the minor's income from all sources; and that is the true effect and result of s. 72.

[They also referred to *Ex parte Huxley* (5); *Tarn* v. *Scanlan* (6); *Bowles* v. *Attorney-General*. (7)]

Latter K.C. and *Andrewes-Uthwatt* for the respondents. These appeals raise a very narrow point of income tax practice. There is no question that income tax may be assessed on the infant and recovered from the guardian under s. 173 of the Act of 1842. Trustees must make a return of the income of their beneficiary so far as they are able, whether that income is derived from their own trust or from another source: *Brooke* v. *Inland Revenue Commissioners*. (8) The Crown therefore can obtain all the information they require. There is perfectly apt machinery provided by the Acts when used in the proper way. The real question is whether the provisions of the Income Tax Acts which enable assessments

(1) [1917] 1 K. B. 61; [1918] 1 K. B. 257, 265.
(2) [1923] 2 K. B. 563.
(3) [1924] 2 K. B. 602; [1926] A. C. 37.
(4) [1919] 2 K. B. 108.
(5) [1916] 1 K. B. 788.
(6) (1926) 135 L. T. 744.
(7) [1912] 1 Ch. 123.
(8) [1918] 1 K. B. 257, 265.

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to be made on trustees and guardians are apt to require assessments to be made to super tax on trustees and guardians in respect of the total income of the infant's property. The questions here are: (1.) Whether the guardian is liable to be assessed in respect of the total income of the infant; (2.) Whether the trustees of the settlement of 1899 are liable to be assessed in respect of the total income under that settlement; and (3.) Whether the trustees of the settlement of 1899 are liable to be assessed in respect of the total income arising not only under that settlement but also the settlement of 1862.

Sect. 72, sub-s. 6, of the Act of 1915, which provides that all provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, etc., are, "so far as they are applicable," to apply to the charge, assessment and recovery of duty under the Act, is not applicable to assessments to super tax. There are no provisions in the Income Tax Acts which enable assessments to tax to be made on trustees or guardians in respect of the total income of an infant. A person is liable to be assessed only in respect of the concern which he is conducting. It is true that an agent of a non-resident may be assessed to income tax on profits and gains which he has not received, but that is under the special provisions of s. 31 of the Finance (No. 2) Act, 1915: *Tarn* v. *Scanlan*. (1)

There is no foundation for the deduction that because of the statement that super tax is an additional income tax therefore all the provisions of the Income Tax Acts are applicable to super tax. It would be a big jump to hold that by reason of that statement that a trustee or guardian was assessable to super tax in respect of the total income of the infant of which he may have imperfect knowledge. The total income is not to be ascertained by adding up the assessments. The deductions to which the beneficiary is entitled to must be taken into consideration.

Sects. 163 and 164 of the Act of 1842 are summarized by Scrutton L.J. in *Earl Howe* v. *Inland Revenue*

(1) 135 L. T. 744.

Commissioners. (1) Sect. 66, sub-s. 1, of the Finance Act, 1910, does not say who the person is who is made chargeable. So too s. 72, sub-ss. 1, 6, which provide that the provisions as to income tax "so far as they are applicable," are to apply, do not state who the persons are who are to be charged. The learned judge was therefore right in saying that there was there no charge on any individual.

It is submitted that the provisions of s. 41 of the Act of 1842 apply only "so far as they are applicable" to super tax, and that the limited assessment for income tax which may be one of a number of assessments in different places by different Commissioners together covering the profits liable to tax, has no application to a single assessment to super tax made by one authority, at a rate varying with the amount of the total income.

There is no provision in the Act of 1842 which renders an agent liable to tax in respect of property not connected with his agency.

In *London County Council* v. *Attorney-General* (2) Lord Macnaghten traces the development of income tax legislation. *Whitney* v. *Inland Revenue Commissioners* (3) decides that the power to require returns is distinct from the power to make assessments.

The first question arises on the assessment of Lady Longford —namely, whether she ought to be assessed on the whole income of the infant or on the amount which she received for his maintenance. That question is to be decided under s. 41 of the Act of 1842. Outside the 2500*l.* received by her for maintenance it is impossible to say she had the "direction, control or management" of the income sought to be taxed so as to bring the case within *Drummond* v. *Collins.* (4) For income tax purposes this income was not taxable at all, inasmuch as the tax had been already paid by the trustees. But assuming the income had not previously been taxed then she was only liable to taxation on the income received by her. There is nothing in s. 41 to make the guardian liable in respect of income which she did not receive.

(1) [1919] 2 K. B. 336, 351.
(2) [1901] A. C. 26, 37.
(3) [1926] A. C. 37, 52, 57.
(4) [1915] A. C. 1011.

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There are no provisions in the Act of 1910 as to partial assessments to super tax, and the Court ought not to infer a power to make such assessments: *Greenwood* v. *F. L. Smidth & Co.* (1)

The making of a return is in no way a condition precedent to an assessment. The right to make an assessment does not depend on whether or not a return has been made.

What is here contended for with regard to the guardian applies equally to the case of the trustees of the 1899 settlement.

R. P. Hills replied.

Cur. adv. vult.

July 27. The following written judgments were delivered:—

LORD HANWORTH M.R. The present, or sixth Earl of Longford, was born on December 29, 1902, and thus came of age on December 29, 1923. His father died on August 21, 1915, and after that date until he attained his majority his mother, the Countess of Longford, acted as his guardian, and in the year 1916–1917 received 2500*l.* for his maintenance from funds held in trust for him.

The Hon. G. M. Pakenham, G. F. Stewart and H. N. Walford are the trustees of the marriage settlement made upon the marriage of the late, the fifth, Earl and the Countess of Longford in 1899, and in the financial years 1917–1920 received the income of that particular trust and paid therefrom the 2500*l.* a year to the Countess for the maintenance of her son.

In 1862, upon her marriage with the fourth Earl of Longford, certain estates were settled by the grandmother of the present Earl, and upon her death on January 22, 1918, the present Earl became entitled as tenant in tail to the rents and profits of these estates. The trustees of this settlement of 1862 were not the same as the trustees of the settlement made in 1899. During the minority of the present Earl these trustees of the settlement of 1862, since the present Earl became entitled in 1918, have contributed a sum of 500*l.* a year for

(1) [1922] 1 A. C. 417, 423.

his maintenance, thus increasing the total sum paid to the Countess for his maintenance to 3000*l.* a year. The balance of the income received by the two sets of trustees under the two settlements was accumulated.

The Countess of Longford was called upon by the Special Commissioners of Income Tax to make a return for super tax for the year ending April 5, 1917, in respect of the income of the present Earl and failed to do so. The Special Commissioners thereupon made an estimated assessment of 12,000*l.* for that year upon her as guardian, based upon the total income of the Earl in the previous year from all sources, including the whole income arising from the property, the subject of the settlement of 1899, but not the income arising from the estates subject to the settlement of 1862, which, as already stated, did not fall into the possession of the Earl till the death of his grandmother in January, 1918.

For the financial year ending April 5, 1918, the trustees of the settlement of 1899 were called upon to make a similar return for super tax of the income of the Earl, but returned only the sum paid for his maintenance in the previous year.

In the years ending April 5, 1919, and 1920, these trustees returned the total sum paid for his maintenance from both settlements of 1899 and 1862, in the previous years respectively, but not the full sums received as the income of both settlements.

The Special Commissioners thereupon made estimated assessments upon the trustees as follows: for the year ending April 5, 1918, 16,000*l.*; for the year ending April 5, 1919, 16,500*l.*; for the year ending April 5, 1920, 26,000*l.*

The Special Commissioners claim the right to make these assessments upon the guardian and trustees respectively by virtue of the powers given originally by s. 41 of the Income Tax Act, 1842, which is now replaced by s. 7, sub-s. 5, of the Income Tax Act, 1918. Inasmuch as the earlier assessments were made before the later Act superseded the Act of 1842, I have in this judgment referred both to the original sections and the existing sections.

The question in all these appeals is whether the guardian and trustees can be assessed to super tax in a representative

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capacity under s. 41 (r. 4 of the General Rules under the Act of 1918) to the full amount of the income of the minor or their beneficiary, respectively.

The Commissioners decided in favour of the Countess of Longford upon the assessment for the year 1917; and inasmuch as the income received by her for the maintenance of the Earl for the previous year ended April 5, 1916, fell below the total income upon which super tax was payable for the financial year, 1917, they discharged the assessment altogether.

For the year 1918 the Commissioners made an assessment upon the trustees in respect of the income paid over for the use of the minor in the previous year, under the 1899 settlement, and for the years 1919 and 1920 upon the income paid over from both the settlements of 1862 as well as that of 1899. The figures were agreed, but the above is the nature of the assessments made. The Commissioners held that the amounts received by the trustees which were not paid over for the use of the minor, but accumulated in their hands, were not income which should have been included in the assessments.

Rowlatt J. has upheld the decisions of the Commissioners. The result is that the assessments upon the trustees are only upon the amounts actually allowed to the minor, and not upon the full sums received by them under their trust, part of which was not paid over but accumulated. Counsel for the Crown have argued in this Court both points and claimed that the guardian and the trustees can be assessed in a representative capacity (*a*) upon the total income of the minor whether in fact it is paid into her hands, or is received by the trustees from the trust which they administer, or from a trust or trusts, not under their control, and (*b*), alternatively, upon the full sum in fact received by the trustees whether that sum is, or is not immediately payable to, and enjoyed by the minor, or is in part accumulated for his ultimate benefit when he has become of full age.

The charge to super tax was imposed by s. 66, sub-s. 1, of the Finance (1909–10) Act, 1910 (Income Tax Act, 1918,

s. 4), in respect of the income of any individual the total of which from all sources exceeded the then limit of 5000*l.* as an additional duty of income tax, and by s. 66, sub-s. 2 (now 1918 Act, s. 5, sub-s. 1), the total income of any individual from all sources was taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts, subject to certain directions thereinafter specified. These latter words are altered in s. 5 of the Act of 1918 to "is required to be estimated in a return made in connection with any claim for a deduction from assessable income but subject to the provisions hereinafter contained." These words were introduced in substitution for the previous ones by s. 32 of the Finance Act, 1920, when the system of assessable income was introduced. But there is no substantial change in effect. Their meaning is that s. 190 of the Act of 1842 is introduced whereby Sch. G, with its rules and directions, is to be followed, "so far as the same are respectively applicable to the case of each person, corporation, company, or society described or mentioned in this Act, on behalf of themselves, and also of others for whom they act in any of the characters described in this Act, or hereinafter mentioned, ... by each such person, corporation, company, or society, or by his or their agents or officers, in the cases where such agents or officers are authorized to make such returns." That is to say the returns are to be made according to the several schedules, and those are to be followed and attended to by persons who act in a representative character. The same system is preserved by s. 207 of the Act of 1918 and the rules and directions contained in Sch. V. to the Act.

By s. 72, sub-s. 2 (Income Tax Act, 1918, s. 7, sub-s. 2), every person upon whom a notice is served requiring him to make a return of his total income from all sources is to make that return, whether he is or is not chargeable with super tax after the return has been made. This section expressly lays this duty upon a person who is chargeable in a

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representative capacity under s. 41 (Income Tax Act, 1918, s. 7, sub-s. 2).

It has been held that under this sub-section trustees are to make a return, to the full extent of their knowledge and information, of all the sources of income of their beneficiary, whether that income is derived from their own trust or another source: see *Brooke* v. *Inland Revenue Commissioners*. (1) But that sub-section only secures the return to the extent of the best ability of the person on whom the duty of making it falls, and expressly leaves the question of chargeability in respect of the income returned open. The right to charge the trustees as claimed in the present appeals is said to be derived from sub-s. 6 of s. 72 of the Finance (1909–10) Act, 1910 (s. 7, sub-s. 6, of the Act of 1918).

The sub-section applies the provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, and the appeals against those assessments and the collection and recovery of the duty and the like "so far as they are applicable," to the "charge, assessment, collection, and recovery of duty under this section." There are persons who are chargeable under that section, for the super tax which is primarily charged under s. 66 is to be assessed and charged by the Special Commissioners, and they have power under sub-s. 5 of s. 72 to make an assessment to the best of their judgment upon any person who fails to make such a return as is required of him under sub-s. 2 and to make additional assessments under sub-s. 7 (s. 7, sub-s. 7, of the Act of 1918).

It is thus, in my opinion, pressing the words of s. 72, sub-s. 6 (s. 7, sub-s. 6), a very long way to claim that under it the sections of the Income Tax Act, which are introduced by reference "so far as they are applicable," and in reference to persons who are to be chargeable, have made trustees who are compelled to make a return also chargeable fully, not only to the extent of the income they receive, but also to the extent of the totality of the income of the beneficiary for whom they receive and hold a contributory part. The

(1) [1917] 1 K. B. 61; [1918] 1 K. B. 257.

mere reference to s. 41 in sub-s. 2 and the actual words "who are to be chargeable" in sub-s. 6 will not in my judgment have such an effect, and if there is such a power, it must be derived from elsewhere.

Under s. 41 of the Act of 1842, an agent who was charged in respect of the profits of a foreign principal was chargeable to the extent only of moneys received into his hands. That was by virtue of the words in s. 100, "shall be charged annually on and paid by the persons receiving the same," and was decided in *Colquhoun* v. *Brooks*. (1) It was not until s. 31 of the Finance (No. 2) Act, 1915, came into force that an agent was made liable in respect of profits on business carried on through his agency, whether he received them or not. Thus s. 41, as it was originally interpreted, did not contemplate or impose a liability beyond the actual receipt of income into the hands of the representative person.

An infant can be directly assessed to super tax. That was decided in *Ex parte Huxley* (2), and by s. 173 of the Act of 1842 upon default of the infant to pay, the parents or guardians or tutors of such infant were made liable and charged with the payments which the infant ought to have paid. See also s. 92 of the Taxes Management Act, 1880. Both these sections contemplate the direct liability of an infant by their words "where a person chargeable with the duties is under the age of twenty-one years."

In my judgment, therefore, no inference can be drawn from the Income Tax Act as it stood, that there was any liability imposed upon guardians or trustees beyond the sums actually received by them in the representative capacity.

Lord Dunedin in his speech in *Whitney* v. *Inland Revenue Commissioners* (3) stated that there are three stages in the imposition of a tax: (1.) The declaration of liability—that is the part of the statute which determines what persons, in respect of what property, are liable; (2.) The assessment which fixes the amount a person has to pay; (3.) The methods of recovery, if the person taxed does not voluntarily pay.

(1) (1889) 14 App. Cas. 493. (2) [1916] 1 K. B. 788.
(3) [1926] A. C. 37, 52.

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Applying the process of those three stages to the present case, by s. 66 (s. 4 of 1918) super tax is levied in respect of the income of any individual, the total of which from all sources reaches a certain standard. In *Tischler* v. *Apthorpe* (1) it was decided that direct assessment upon a firm can be made even though there is supplementary machinery under ss. 41 and 53 available, whereby their agent could be assessed; and see per Fry L.J. in *Werle & Co.* v. *Colquhoun.* (2) In *Ex parte Huxley* (3) Lord Cozens-Hardy took this same view. Looking at s. 173 of the Act of 1842 and s. 92 of the Taxes Management Act, 1880, he said: "I cannot escape from the language of those two sections. They seem to assert that the infant is a Crown debtor, except so far, if at all, as a different result may follow under the earlier sections where there is a trustee or guardian." The other members of the Court use language to the same effect. This case also decides that the machinery of direct assessment can be used. Rowlatt J. in *Maclaine & Co.* v. *Eccott* (4) pointed out that when the liability of non-resident persons was enlarged, it is the non-resident who remains chargeable and assessable, though in the name of, and by the instrumentality of, the agent.

Thus there can be no question that the first two stages stated by Lord Dunedin can be fulfilled without recourse to the imposition of the liability upon the trustee or guardian. The third stage is easily complied with, for in addition to the usual methods of recovery, ss. 41 and 173 of the Act of 1842 and s. 92 of the Act of 1880 come in aid to lay the duty of payment upon the representative person (General Rules of 1918, rr. 4 and 5) in lieu of the person primarily liable.

But the argument for the Crown in the present case is in the reverse order. It is claimed that because representative persons are required to make returns for super tax, and because sections relating to the income tax are made available "so far as they are applicable," and relating to persons who are to be chargeable, there must be a liability laid upon those representative persons.

(1) (1885) 2 Tax Cas. 89.
(2) (1888) 20 Q. B. D. 753, 763.
(3) [1916] 1 K. B. 788, 798.
(4) (1924) 10 Tax Cas. 481, 545.

Sect. 31, sub-s. 2, of the Finance (No. 2) Act, 1915, provided that a non-resident person should be chargeable in respect of certain profits or gains under s. 41 of the Act of 1842, as amended and enlarged by that s. 31, and it was attempted in *Greenwood* v. *F. L. Smidth & Co.* (1) to impose a liability upon a non-resident in respect of trade, even though it was not exercised in the United Kingdom, because s. 31, sub-s. 1 (*b*), had extended s. 41, so as to cover profits not actually received by the agent. The attempt failed, and Lord Buckmaster (2) observed that "The Courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambiguous meaning, it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer."

I have already said in *Whitney's* case (3) that I agree with the view expressed by Lord Sterndale in *Davis* v. *Inland Revenue Commissioners* (4), that if it be sought to deduce from the statement that super tax is an additional income tax "the proposition, that therefore all provisions with regard to income tax or super tax are to be considered as common to them both, there is no foundation for such a deduction." I agree with Mr. Latter that it is a big jump to hold that the agent, trustee or guardian is assessable and chargeable for the total income of the person whom he represents and of whose income from all sources he may have imperfect knowledge, as well of its total amount, as of the deductions which that person may be entitled to make from it; while, as I have already pointed out, the same system of estimation of the income is retained as is required in a return made for income tax in connection with any claim for a deduction from assessable income under the distributive schedules and with the deductions allowed under them.

The inconveniences—indeed hardships—which the view contended for by the appellants involves are well set out by Rowlatt J. in his judgment in this case. (5) Assume

(1) [1922] 1 A. C. 417.
(2) Ibid. 423.
(3) [1924] 2 K. B. 602, 610.
(4) [1923] 1 K. B. 370, 373.
(5) [1927] 1 K. B. 594, 614.

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three trusts with a beneficial income in each of 1500*l.* a year, how can the super tax, with its graduations of the rate to be charged, be estimated upon the total income of 4500*l.* and recovered from one set of trustees? In *Williams* v. *Singer* (1) it was clearly stated in the judgments of the Court who were considering s. 41, that the person liable to be taxed is the beneficiary, and that the purpose of the section is to provide machinery by which, in the cases specified, income tax may be more readily recovered.

In the report of the same case in the House of Lords (2), Lord Cave expresses the view that there may be cases in which a trustee in receipt of trust income may be chargeable with income tax upon such income, but that in cases where a trustee or agent is made chargeable with the tax, the statutes recognize the fact that he is a trustee or agent for others, and he is taxed on behalf of and as representing his beneficiaries or principals; see also per Lords Wrenbury (3) and Phillimore. (4) For these reasons I agree with Rowlatt J. on the first point.

The second point above stated was apparently not fully argued before Rowlatt J., but it has been fully argued by Mr. Hills in this Court. In my judgment, the judgment of Rowlatt J. is right upon both points. I agree with his reasoning upon the second point, and do not desire to add more, for the reasons which I have given upon the first point apply in a large measure to the second.

The appeals must be dismissed with costs.

SCRUTTON L.J. The present Earl of Longford was born on December 29, 1902, succeeded to the earldom on August 21, 1915, and came of age on December 29, 1923. He had, on succeeding to the title, a total income which subjected him to the payment of super tax. These appeals relate to the endeavours of the Inland Revenue to find the best way of making him pay:—

1. For the year April 6, 1916, to April 5, 1917, the Crown assessed his mother and guardian, the Countess of Longford.

(1) [1919] 2 K. B. 108.
(2) [1921] 1 A. C. 65, 72.
(3) [1921] 1 A. C. 76.
(4) Ibid. 82.

She paid on the amount of income she administered; the Revenue desired to assess her on the total income of the Earl. The Special Commissioners declined so to assess her, and Rowlatt J. affirmed their decision. The Crown appeal.

2. For the year 1917–1918 the Crown assessed the trustees of the settlement under which the whole income of the Earl was derived on the whole income of the year. The Special Commissioners discharged the liability as to such part of the income as the trustees were accumulating, as not being income of the Earl, and also declined to assess the trustees personally for either the whole income or the part of the income they handed over. Rowlatt J. disagreed with their decision as to the accumulated funds, but held that the trustees could not be assessed either on the whole income or that part of the income which was paid to the guardian of the Earl. The Crown appeal.

3. On January 22, 1918, the Earl, by the death of his grandmother, became entitled under another settlement with different trustees to a further income. The Crown accordingly assessed for the years 1918–1919 and 1919–1920 the first trustees on the whole income of the Earl. The Special Commissioners again declined to assess either the whole income of both or either trust or on the part accumulated or the part administered. Rowlatt J. disagreed as to the part accumulated, but declined to assess both sets or either set of trustees either on the whole income of the two trusts, or the whole income of either trust, or on the part handed over. The Crown appeal.

4. For the year 1920–1921 the Crown assessed the Earl of Longford direct. The assessment was discharged by the Special Commissioners, but restored by the judge on the authority of *Ex parte Huxley* (1), and there is no appeal against this decision.

All infants, therefore, can be directly assessed to super tax, and having been so assessed, under s. 173 of the Act of 1842 (now s. 161 of the Act of 1918) the parent, guardian or

(1) [1916] 1 K. B. 788.

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tutor can be made liable for the tax originally charged on the infant.

The questions in the appeal are :—

1. Whether the guardian can be directly assessed to super tax in respect of the infant, either on the infant's whole income or the part of it which the guardian administers, without the necessity of assessing the infant.

2. Whether the trustees of the settlement under which the infant receives income can be assessed directly to super tax in respect of the infant, and if so, whether on the whole of the infant's income from every source or the whole of the income from the settlement of which they are trustees. The distinction between funds paid over and funds accumulated is no longer in question ; both are income of the infant.

Super tax was granted by the Finance Act of 1910, and is now dealt with in Part II. of the Income Tax Act of 1918, as modified by subsequent Finance Acts, especially that of 1925, which commences a graduated tax at a rate rising with the amount of income. Income up to 2000*l.* is free ; the next 500*l.* pays ninepence in the pound, and so with gradual rises till each thousand pounds above 30,000*l.* pays six shillings in the pound. By s. 66 of the Act of 1910 super tax is charged "on the income of any individual" (which excludes companies) ; it is charged on the total income of that individual from all sources for the previous year. By s. 72, sub-s. 1, the total income is assessed by the Special Commissioners. In this it differs from income tax, which is assessed on various parts of the income by various general or additional commissioners, according to the situation of the property or residence of the individual, or schedule under which the income is taxable.

Sect. 72, sub-s. 2, provides for returns of total income and sub-s. 4 for penalties if the person who has to make the return "without reasonable excuse" fails to make such a return. The "persons" who have to make returns are :—

(1.) A person required to make a return of "his total income" ;

(2.) a person who is chargeable with or liable to be assessed to income tax under s. 41 of the Income Tax Act, 1842, as representing an incapacitated, non-resident, or deceased person, who makes a return of the total income from all sources of the incapacitated, non-resident or deceased person;

(3.) a person who is chargeable with or liable to be assessed to income tax under s. 24 of the Customs and Inland Revenue Act, 1890, as representing a deceased person who makes a return of the total income from all sources of the deceased person. The recited section provides that if a person dies without having made a return of his profits, his executors or administrators may be directly charged in respect of the profits arising before his death.

Every person in classes (1.), (2.) and (3.) is to make a return "whether he is or is not chargeable with the super tax"; which assumes that some of them are not chargeable with super tax. These words may refer to total incomes under 2000*l.*, not chargeable as compared with incomes over 2000*l.*, which are chargeable; or to persons chargeable, such as the owner of the income, or the executor, who is chargeable through his testator is not assessed, as compared with trustees, if they are not chargeable on the whole income of the cestui que trust.

Going back to s. 41 of the Act of 1842, it provides that certain classes of persons (1.) bearing certain relations to a second class of persons (who are described in the Act of 1910, s. 72, sub-s. 2), and the Act of 1918 (General Rules, r. 4 and s. 237 definitions) as "incapacitated persons" and (2.) having the direction, control or management of the property of such incapacitated persons, shall be chargeable to the duties of income tax in the same manner and to the same amount as the incapacitated person would be charged, if he were not incapacitated. The first class of persons is described as "trustees, guardians, tutors, curators or committee"; the incapacitated persons as "infants, married women, lunatics, idiots or insane" (one would have liked to ask the draftsman the difference between a lunatic and an insane person).

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The first class of trustees, etc., were to be taxed, whether the incapacitated person was or was not resident in Great Britain.

Sect. 41 dealt with a further class of person: the resident factor, agent or receiver of a non-resident person, who had the receipt of any profits or gains belonging to such non-resident person, was chargeable in the like manner and to the like amount as if such non-resident person were resident in Great Britain and in the actual receipt of such profits.

Of the persons whose own income could be taxed in the name of a representative, it will be seen that (*a*) the infant was also directly assessable: *Ex parte Huxley* (1); (*b*) the married woman under s. 45 was taxable in the name of her husband, and not in the name of her trustee, or in her own name. Now under r. 16 of the General Rules of the Act of 1918, a married woman can in certain circumstances and for certain profits be taxed in her own name.

(3.) As to a lunatic, Lush J. in *Ex parte Huxley* (2) seemed to think obiter that a lunatic could not be directly charged, but Lord Cozens-Hardy in the Court of Appeal appears to take an opposite view.

It seems clear that so far as income tax is concerned, the liability of the trustee or agent does not exclude the liability of the principal, whether incapacitated or non-resident, and vice versa. It also seems clear that for income tax purposes the liability of the trustee or agent is limited to the profits which he controls or manages; and though the limitation of the liability of the agent to profits received has been removed by the Finance (No. 2) Act, 1915, s. 31 (now Act of 1918, General Rules, r. 5), I think the liability for income tax of the trustee or agent is still limited to the British property or trade he controls or manages, though he does not "receive" the profits, and does not extend to all British profits of the principal, though the trustee or agent has nothing to do with part of those profits, still less to all profits, whether British or not. There may be an assessment for income tax on the trustee or agent in respect of part of the profits, just as there

(1) [1916] 1 K. B. 788. (2) [1916] 1 K. B. 794.

may be a partial assessment on a resident principal, or one of full capacity.

We now reach the real difficulty in the case. Sect. 72, sub-s. 6, of the Finance (1909–10) Act, 1910 (now s. 7, sub-s. 6, of the Act of 1918), enacts that "All provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments . . . . shall, so far as they are applicable, apply to the charge . . . . of duty under this section," i.e., to the duty of super tax. The Crown say that the trustee or guardian of an infant is chargeable to income tax under s. 41 of the Act of 1842, and is therefore by this section made chargeable to super tax. Their contention would also apparently apply to all representatives under s. 41, including the agent of a non-resident principal who has British properties yielding profits liable to income tax. The Crown further contend that they can assess these representatives to super tax on all profits of their principal, though the representative has no control, management or receipt of those profits or of the properties from which the profits are derived. Rowlatt J. says (1) that the contention of the Attorney-General before him was limited to assessment of the total income of the principal, and not put forward as to the total income controlled by the trustee. Before us, however, undoubtedly the latter view was contended for in the alternative at any rate by the junior counsel for the Crown.

Counsel for the subject contended that s. 41 was only to apply "so far as applicable" to super tax, and that the limited assessment for income tax which might be one of a number of assessments in different places and by different commissioners, together covering all the profits liable to tax, had no application to a single assessment for super tax made by one authority, at a rate varying with the amount of the total income. The argument may be illustrated by a case: A., a non-resident principal, has three English agents, carrying on three separate businesses, each producing a profit of 1500*l.*, 4500*l.* in all. No one of them will be assessed to income tax at more than 1500*l.* How in the Crown's view are they to

(1) [1927] 1 K. B. 594, 611.

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be assessed to super tax? The income under 2000*l.* is not to be assessed at all: from 2000*l.* to 2500*l.* it pays ninepence in the pound; from 2500*l.* to 3000*l.*, one shilling; from 3000*l.* to 4000*l.*, one shilling and sixpence; and the last 500*l.*, making 4500*l.*, at two shillings and threepence. To which agent are you to allow the first 2000*l.*, and at what rate will each agent pay? There is no provision for this sort of thing in s. 41, which is not concerned with assessments on total income at different rates in one assessment, but only with assessments on income controlled or managed at one rate. Of course you might have a provision that the total amount due from the principal for super tax, if he were assessed directly, should be ascertained, and then the liability divided amongst the three agents, proportionately to their respective incomes. But where is there a trace of this in s. 41? I do not understand how a provision for liability for income tax only on income controlled or managed, when applied to super tax, can produce a liability on the agent for all income of the principal, whether controlled or managed by the agent or not. If the agent cannot be assessed on his principal's total income, I can see nothing in s. 41 to provide for a pro rata adjustment of the super tax obtained by one assessment of the total income, over the various agents who manage parts of that income.

It has been held by the House of Lords in *Whitney's* case (1) that a non-resident principal can be directly assessed to super tax on his British profits after notice sent to him. There is, as far as I know, no decision yet where an agent has been assessed to super tax on the whole or part of the profits of his non-resident principal.

In my opinion, the provisions of s. 41 are "not applicable" to the assessment of super tax on a representative of a principal, either in respect of the whole or part of his principal's income; and I, therefore, agree with the judgment of Rowlatt J., and think that the appeals of the Crown should be dismissed.

There are two matters of regret in the case. First, the length of time these proceedings have occupied. In 1927,

(1) [1926] A. C. 37.

the assessment for 1916 has not yet finally been determined and five years were taken to state the special case. No satisfactory explanation was offered to us of the delay. Secondly, I think the case is a bad example of legislation by reference. Probably to get a Bill through Parliament, a number of existing statutory provisions are incorporated "so far as applicable." I doubt whether Parliament or the draftsman, or the responsible Minister, ever considered which of those provisions were applicable, but the whole block is thrown at the head of the Courts, which have to consider which of them are applicable in whole or part. This case is an example of the deplorable result.

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In my opinion there is a clear and simple reason for dismissing this appeal. I cannot see that the Countess ever had within s. 41 of the Income Tax Act, 1842, "the direction, control or management of the property or concern" of her infant son or the receipt of the profits or gains of the property within the language of Lord Parker in *Drummond* v. *Collins*. (1) The control or management of the property and the receipt of the profits and gains were in the hands of the trustees, who made her from and out of the income of the property such an allowance as they thought fit for the purpose of the maintenance and education of her son. It was of course they and not she who were chargeable with income tax on the whole income of her property, including the amount of any such allowance, which was no doubt a net sum. Nor did she, I think, receive it as guardian in the sense in which that word is used in s. 41. She received it not of independent right, but as the person to whom the trustees under their discretionary powers thought fit to entrust the actual expenditure of the allowance in question. Even therefore if the allowance in the year 1916–1917 exceeded the then limit for super tax, the Countess was not within s. 72

(1) [1915] A. C. 1011, 1019.

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of the Finance (1909–10) Act, 1910, as not being a person chargeable with income tax as representing her son.

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Super tax was created and imposed for the first time by Part IV., ss. 65–72 inclusive, of the Finance (1909–10) Act, 1910. At that time the machinery for the assessment and collection of income tax was regulated by the Income Tax Act, 1842. Sect. 72 of the above Act of 1910 contains a general referential application of this machinery to the assessment and collection of super tax, and the questions to be determined on this appeal depend on the effect of this general referential application, and particularly with regard to any application to super tax of the special provisions of s. 41 of the Act of 1842.

Rowlatt J. in his judgment has referred throughout to the similar provisions of the consolidating statute—namely, the Income Tax Act of 1918. But the appeal has been argued before us with reference to the similar provisions of the Income Tax Act, 1842, and Part IV. of the Finance (1909–10) Act, 1910. The latter seems to me the more convenient course, and is that which I propose to adopt. For these two Acts do in fact govern the earlier of the three periods which are in question. And further, in considering the incorporation in the later provisions of 1910 of the earlier existing provisions of 1842, it is of assistance to preserve the chronological order of the legislation.

Sect. 41 of the Act of 1842 provides that (amongst other persons) trustees having the management of the property of an infant shall be chargeable to income tax in like manner and to the same amount as would be charged if the infant were of full age, and that every such trustee shall be answerable for the doing of all such acts as shall be required to be done by virtue of that Act in order to the assessing of any such infant to the duties granted by that Act and paying the same. It is clear that the respondent trustees were under

this section chargeable for and liable to pay the income tax payable as from August 21, 1915, in respect of the Irish estates which were comprised in the settlement of 1899.

Under sub-s. 2 of s. 72 of the Finance (1909–10) Act, 1910, after service upon any person of a notice by the Special Commissioners requiring him to make a return of his total income from all sources, he becomes bound to make such a return, whether he is or is not chargeable with super tax —these last words, I think, clearly referring to cases where the subject may think he is below the super tax limit and preventing such a person from refusing to make a return on that ground. And in the case of such a notice served upon any person who is chargeable with or liable to be assessed to income tax under s. 41 of the Income Tax Act, 1842, as representing an incapacitated person (which phrase, of course, includes an infant), he is liable to make a return of the total income from all sources of the incapacitated person. It seems clear that the terms of this section apply to and include the respondent trustees, and impose a statutory obligation on them to make a return of at least the income of the Irish estates as comprised in the settlement of 1899. Indeed, this was hardly contested by the counsel for the respondents, and appears to be concluded by the decision in *Brooke* v. *Inland Revenue Commissioners* (1); and see also *Inland Revenue Commissioners* v. *Huni* (2) and *Whitney's* case. (3) Further, the words of the sub-section, taken in their ordinary meaning, do in terms appear to impose a prima facie obligation on the respondent trustees to make a return of the total income of the infant, though ignorance as to any income other than that from the Irish estates may be a reasonable excuse under sub-s. 4 for failing to make a return of any such other income.

Then, after a sub-s. 5, which enables the Special Commissioners to make an assessment in default of a satisfactory return, comes sub-s. 6, which is the really crucial one in this case. Under that sub-section: "All provisions of the

(1) [1917] 1 K. B. 61; [1918] 1 K. B. 257.
(2) [1923] 2 K. B. 563.
(3) [1924] 2 K. B. 602; [1926] A. C. 37.

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Income Tax Acts relating to persons who are to be chargeable with duty, assessments, and appeals against those assessments, and to the collection and recovery of duty, and to cases to be stated for the opinion of the High Court shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of duty under this section." The question here is whether the respondent trustees are persons who fall within the words of that sub-section, and so are liable to have made upon them what the learned judge in a very convenient phrase has called representative assessments.

Rowlatt J. has pointed out with much force the marked distinction between income tax and super tax, consisting mainly in the partial local and piecemeal assessment of the one and the wide general assessment of the other. He has also pointed out the difficulties that may arise in certain cases through a sweeping application to super tax of the principle of representative assessment as enacted with regard to income tax. And in the result he has, as I understand him, held that representative assessments cannot be made in respect of super tax at all under this sub-section. But in my judgment, and with great respect to him, he has allowed his consciousness of these difficulties to lead him in effect to strike out sub-s. 6 altogether from the statute. To my mind it is reasonably clear that sub-s. 6 is consequential on sub-s. 2, and deals with and renders representatively assessable to super tax the same classes of representatives as are liable to make returns under sub-s. 2, who again are the same classes as are liable under s. 41 of the Act of 1842 to representative assessments to income tax. The Legislature in enacting sub-s. 6 and assimilating the liability of trustees to super tax to their liability to income tax must have had in mind the broad distinctions between income tax and super tax. And I do not think any construction of s. 72, and particularly of sub-s. 6, is permissible, which negatives altogether the possibility of representative assessments to super tax. The marked distinction pointed out by the learned judge between income tax and super tax might have formed good grounds for declining to pass legislation applying

to the collection of super tax machinery analogous to that already existing for the collection of income tax. They do not in my view form reasons for interpreting the legislation, when once passed, in any other than the natural meaning of the words used. And I do not think that the language of sub-s. 6 as to persons chargeable with duty can be satisfied by construing them as referring merely to the liability of a husband to tax on his wife's income under s. 45 of the Act of 1842.

The words in sub-s. 6, "so far as they are applicable," have still to be considered. Much more stress was laid upon them in the argument for the respondents than in the judgment of Rowlatt J. But they do not seem to me sufficient to exclude, in the cases now in question, the prima facie representative assessability of the respondent trustees. Taking for instance the two years in which the income of the infant was derived from the Irish estates, I cannot see that the mere possibility that there might be some other income of the infant can prevent the provisions of the Income Tax Acts with reference to the representative assessment of the trustees to income tax from being applicable so as to render them representatively assessable to super tax to the extent of the assessments which were actually made upon them. As regards those years at least the assessments on them would appear to be sustainable, for I omit for clearness the possibility that in the second year some small income has been brought in from the Bedfordshire estates.

Then again take the case of the year 1919–1920, when the income of the infant was derived both from the Irish estates under the settlement of 1899 and from the Bedfordshire estates under the settlement of 1862. Is there sufficient in the fact of there being this double source of income to relieve the trustees of the Irish estates from the obligation to make a return of the total income of the infant from both estates or to exclude the trustees of the Irish estates from liability to assessment on the total income? I do not think so. No doubt if these trustees are unable to ascertain and state the income of the Bedfordshire estates, this will be a

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reasonable excuse within sub-s. 4 for failure to make a return of total income and will save them from any penalty under that sub-section. But it will not prevent the Special Commissioners making an assessment under sub-s. 5 if they choose. And I see no sufficient reason for holding that the circumstances of the case are such as to bring into play the saving words of sub-s. 6 and to make the provisions of s. 41 of the Act of 1842 as to the assessment of these trustees to income tax inapplicable to their assessment to super tax in respect of the income of both estates.

There is indeed one case in which the provisions of s. 41 might not be applicable to the assessment of trustees of a particular fund to super tax—namely, a case in which the income of that fund was so small in proportion to the other income that the super tax on the total income actually exceeded the income of the particular fund. In such a case the words "so far as applicable" might no doubt prevent any assessment of the trustees to an amount exceeding their trust income. But this would be a very exceptional case, and is obviously not the case here. As matters stand here, I do not see sufficient to render inapplicable the general statutory direction that the liability of the trustees to assessment to income tax under s. 41 is extended to a liability to assessment for super tax, although that tax will be calculable on the income of both estates.

A great deal was made in the argument for the respondents of the difficulties that might arise where there were several trust funds, particularly in view of the present graduated rates of super tax. I doubt whether it is permissible to rely on this last circumstance in construing the Act of 1910, which imposed a flat rate of duty only, unless perhaps for the purpose of urging that this graduation of the rate of duty is another circumstance which has by now prevented the provisions of s. 41 of the Act of 1842 from being "applicable." But in my opinion these difficulties are more apparent than real. After all, the charge of super tax falls ultimately not on the trustees but on the total income of the infant cestui que trust. And it matters not at all either to the infant or to

the trustees sought to be assessed whether the tax is taken from the income of one trust fund rather than of another, so long as the trustees of any one fund are not rendered liable for more than the whole income of their fund. In such a case where their liability would exceed their funds, and in any other possible case in which the perfectly rigid application of the provisions of s. 41 of the 1842 Act would be liable to cause actual injustice, this result would, I think, be prevented by the limiting words of sub-s. 6 " so far as applicable." But in cases like the present, where there are two funds only and the figures are such that the assessment of super tax on the trustees of the one fund (in this case the Irish estates) involves a liability very far short of the income of that fund, I cannot myself see that the provisions as to the assessment of these trustees to income tax are so inapplicable to their assessment to super tax as to except this case from the general legislative directions of s. 72 and particularly of sub-ss. 2 and 6 thereof.

In my opinion the judgment in this case should be reversed and the assessment on the trustees should be confirmed, subject of course to the ascertainment of figures, which it is agreed need some examination and adjustment.

Appeals dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for Countess of Longford and trustees: *Walfords.*

W. I. C.

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Jan. 27, 28, 31;
Feb. 18.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

TODD (INSPECTOR OF TAXES) *v.* EGYPTIAN DELTA LAND AND INVESTMENT COMPANY, LIMITED.

Revenue—Income Tax—Residence—Company incorporated in England—Registered Office in London—Business carried on Abroad—Directors resident Abroad—Liability of Company to Tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case V.*

A limited company which is incorporated and registered under the Companies Acts of the United Kingdom, and fulfils the obligations and duties imposed upon it under those Acts, is resident in the United Kingdom for the purposes of the Income Tax Acts, although the seat and conduct of its business and the residence of its directors are wholly in a foreign country.

The Commissioners for the General Purposes of Income Tax had held on the facts of the case that the company was not resident in the United Kingdom for the purposes of income tax :—

Held, that the company could have more than one residence, and that for the purposes of income tax it was resident in the United Kingdom.

Decision of Rowlatt J. affirmed.

Swedish Central Ry. Co. v. *Thompson* [1924] 2 K. B. 255 ; [1925] A. C. 495 applied.

CASE stated by the Commissioners for the General Purposes of the Income Tax, from which the following material facts are taken :—

The Egyptian Delta Land and Investment Company, Ld., was incorporated in England on April 20, 1904, under the Companies Acts, 1862 to 1900, as a company limited by shares. The nominal capital of the company was 500,000*l.* divided into 500,000 shares of 1*l.* each, of which 324,250 had been issued.

The objects for which the company was established included the following :—

(*a*) To purchase or otherwise acquire, develop, hold, sell, let or otherwise dispose of and deal in land, or other immovable property situate in any district in Egypt in which the railways belonging to, or that might at any time thereafter belong to the Egyptian Delta Light Railways, Ld., or any extension or branch thereof existing or thereafter constructed

or proposed to be constructed might serve or be intended to serve.

(*b*) To develop the resources of any such lands or other property by building, planting, draining, levelling, filling in, reclaiming, irrigating, clearing, farming, cultivating, colonising, stock raising, timber-growing, mining, quarrying, and otherwise dealing with the same, in such ways as might seem capable of improving directly or indirectly the property and undertaking of the company.

By special resolution of the company passed on April 16, 1907, and confirmed on May 7, 1907, it was resolved (inter alia) that it was desirable that the business and affairs of the company should henceforth be managed and directed entirely from Egypt and that accordingly the articles of association be varied.

In pursuance of that resolution the business of the company was in 1907 transferred to Cairo and had since that date been controlled, managed, directed and carried on entirely in Cairo with the results following, all of which were proved in evidence before the Commissioners and applied to the whole period since 1907 :—

(*a*) In 1907 all the London directors retired and a new board of directors was appointed consisting of four members all of whom had been permanently resident in Cairo. Since 1907 no meeting of directors had been held in the United Kingdom. There had been no committee of directors in the United Kingdom.

(*b*) The secretary general of the company had resided, and still resided, in Egypt.

(*c*) The seal was removed to and had been kept in Egypt. There was no duplicate seal. The minute books and all books of account of the company were also removed to Egypt and had remained there.

(*d*) The banking account of the company was with the National Bank of Egypt at Cairo, but the company's former account with the London agency of the same bank had never been formally closed but was only used by the London agency of the bank for debiting small disbursements not exceeding

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8*l.* or 9*l.* in any year made by the agency on instructions from Egypt, no cheques being drawn on the account.

(*e*) The register of transfers was kept in Cairo, where transfers of shares were passed before being registered in London. Under 1 per cent. of the issued shares were registered shares.

(*f*) The accounts of the company and the books of account had been kept and made up and audited in Cairo.

(*g*) Dividends had been declared in and paid exclusively from Cairo.

(*h*) All meetings of the company had been held in Cairo.

(*i*) The reports of the directors were prepared and sent out from Cairo, and there was a duplicate register of shareholders in Cairo.

In order to comply with the requirements of the Companies Acts there was a registered office of the company in London at which the registers of members and directors and also a register of bearer warrants were kept. To meet these statutory requirements the company paid a fee to Mr. F. J. Horn, who carried on the business of secretary of public companies and provided them with a registered office at his address at Gresham House, Old Broad Street, where the name of the company appeared with those of five other companies on the door. Mr. Horn received for these services, and for small incidental expenses 35*l.* per quarter, which he paid into an account in his own name with the London agency of the National Bank of Egypt. No separate room or part of a room was appropriated to the company, and in fact there were more companies than rooms. The statutory duties of the London secretary involved the filing of the annual summary with the registrar of joint stock companies after it had been checked in Egypt and signed there, and of any other documents required to be filed with the registrar. The transfers of shares were kept in his office after they had been passed in Cairo and the certificates issued from there. The share certificate book was kept in Cairo. The London secretary occasionally received and dealt with correspondence from shareholders.

He would also receive any application for share warrants and any transfers which might be lodged at the registered office, and would transmit the same to the company in Egypt to be there dealt with. Certificates of shares in respect of London applications when received from Cairo would be handed by him to the person entitled thereto. The London secretary would also insert an advertisement of the closing by the company of the share register as directed by the board in Egypt. Further, he would receive from a shareholder and pay over to the revenue any stamp duty in respect of share warrants. In April, 1922, he received from Egypt and paid on behalf of the company a sum due in respect of corporation profits tax. The London secretary kept a cash book in which he entered any expenditure on behalf of the company, and he would recoup himself out of the sums paid to him as aforesaid. He held no power of attorney from the company, and his position was purely formal and he had no authority to do anything more than the law required the company to do here.

The following assessments to income tax were made upon the company pursuant to the Income Tax Act, 1918, Sch. D: For the year 1919–20 3212*l.*, for 1920–21 3504*l.*, for 1921–22 3732*l.*, and for 1922–23 4785*l.*, all under Case V. on rents; for 1923–24 3000*l.* under Case IV. on interest on mortgages, and 6000*l.* under Case V. on rents; and for 1924–25 3000*l.* under Case IV. on interest on mortgages, and 7000*l.* under Case V. on rents.

The company appealed against these assessments to the Commissioners for the General Purposes of the Income Tax for the City of London, and on November 16, 1925, the appeal was heard by the Commissioners.

The company contended that in the circumstances as above stated the case of *Swedish Central Ry. Co.* v. *Thompson* (1) was distinguishable and that the company was resident in Egypt and not in the United Kingdom, and that the mere fact that it had been registered in the United Kingdom and therefore had a registered office here and

(1) [1925] A. C. 495.

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otherwise complied with the statutory requirements of the Companies Acts with regard to companies incorporated in the United Kingdom did not constitute residence in the United Kingdom for the purposes of the Income Tax Acts.

For the Crown it was contended that the case was not in principle distinguishable from that of the *Swedish Central Ry. Co.* v. *Thompson* (1), and that the company was resident in the United Kingdom for the purposes of the Income Tax Acts because :—

(1.) On any view of the facts required as a test of residence, other than management and control, the incorporation of a company in this country, the situation here of its registered office and the activities required by law to be performed here were essential and important elements which were all present in this case, and

(2.) There were in addition (*a*) optional activities which could take place at the registered office, and (*b*) the actual activities of the London secretary, which, as shown by the evidence, were appreciable and important.

The Commissioners held that on the facts proved in evidence during the hearing of the appeal this case was distinguishable from the case of *Swedish Central Ry. Co.* v. *Thompson* (1), and found that the company was not resident in this country for the purposes of the Income Tax Acts, and they allowed the appeal.

The Crown appealed.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the Crown.

Sir John Simon K.C. and *Bremner* for the respondent company.

ROWLATT J. I think the two points that lie by the side of the questions in the present case are fairly clear. One is, that the mere fact of registration does not determine the residence. The legislature might conceivably provide for the incorporation of a company, leaving it entirely at large as to where it should go, where it should establish itself, and putting no ties of locality upon it at all. In circumstances

(1) [1925] A. C. 495.

like those I do not think, upon the best view I can form of the authorities, that a company could be said to reside in the place to which it merely owed its birth. That, I think, is what was meant by Huddleston B. in *Cesena Sulphur Co.* v. *Nicholson* (1), and that is what I think was meant by Lord Wrenbury in the passage to which reference has been made in *Bradbury* v. *English Sewing Cotton Co.* (2) The other point also is, I think, clear, and that is, that where a company has its control and management it resides, but not necessarily exclusively.

The question which I have to decide here is whether an English company having—I use the word without begging the question—the establishment which the law requires in this country, does not necessarily reside here, although its whole control and management may be abroad. Now it seems to me that the Companies (Consolidation) Act, 1908, puts upon a company which is incorporated in England the obligation to have a residence here. It is not only that a company is compelled to perform certain duties here, and make certain returns and so on. That it might possibly do from abroad. The Act requires that it shall have a place here from which it is done. It seems to me, applying the analogy from a natural person to a company upon the question of residence, that that is saying that a company shall always be at home in England at a particular place.

Sir John Simon in his argument treated the obligations of the company as being practically to have an address at which it could be served with process. He kept dwelling upon that aspect of a company's head office. He said, very naturally, that it may be provided that service of process shall be good upon a person, natural or artificial, if effected at a particular place, without that amounting to residence at all, because service of process is permitted by many systems of law to be very artificial. That is true, but all the other obligations which are laid upon a company must also be borne in mind, the keeping of the register, the right of the public to inspect the register, and so on. All those are

(1) (1876) 1 Ex. D. 428. (2) [1923] A. C. 744, 765.

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things which the law insists that a company shall be here to do. It seems to me that that fulfils the idea of residence. Lord Parker has observed in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (*Great Britain*), *Ld.* (1), that a company can change its residence. Of course that is perfectly true of its voluntary residence which it obtains by having its control in a particular place; but I do not think what he said touches the question I have now to decide, whether an English company does not necessarily reside in this country if it performs, as it must perform, the duties laid upon it by statute. Parliament has said that the office for the purposes I have indicated must be in this country. At any rate it has said that the company must have its establishment somewhere, and it has also said that it must be in this country. It must have an establishment and the establishment must be here. That it is here is perhaps an accident, as I have said, but I think a company cannot be incorporated under the Companies (Consolidation) Act, 1908, as an ambulatory being that can have no residence anywhere, or, at any rate, not a residence where it has its registered office. That is my view upon it, but I am bound to say that, if my view had been otherwise, I should have hesitated long before I expressed it, having regard to what Warrington L.J. said in the *Swedish Railway* case. (2) I do not think that what he said was obiter in the sense of being a mere collateral observation by the way. It really was a reason for his decision, although he also could, and I think did, arrive at it upon a wider ground.

Therefore, both upon my own view, and still more in deference to what Warrington L.J. said, I think I must hold that the Crown here are entitled to succeed with costs.

J. R.

The company appealed. The appeal was heard on January 27, 28 and 31, 1927.

Sir John Simon K.C. and *Bremner* for the appellants. Five propositions may, according to decided cases, be made:

(1) [1916] 2 A. C. 307. (2) [1925] A. C. 495.

(1.) In dealing with cases of income tax, the question is one of residence, not one of nationality or domicil; (2.) In applying the conception of residence to a company one ought to proceed by analogy—"a company resides for purposes of income tax where its real business is carried on, and the real business is carried on where the central management and control actually abides": per Lord Loreburn L.C. in *De Beers Consolidated Mines, Ld.* v. *Howe* (1); (3.) The residence of a company can change from time to time: per Lord Parker and Lord Sumner in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (*Great Britain*), *Ld.* (2); (4.) A company can have two residences, that is, its central management and control may be divided: per Viscount Cave L.C. in *Swedish Central Ry. Co.* v. *Thompson* (3); and (5.) Residence is a question of fact.

Here we start with a finding of fact by the Commissioners that the appellants are not resident in this country. We submit that they were right, and that the Crown's proposition is not true—namely, that whatever the circumstances, a company registered under the English Joint Stock Companies Acts and complying with the requirements of those Acts, must as a matter of law be deemed to be resident in this country for the purposes of income tax.

No doubt the place of incorporation is a fact to be borne in mind, but the true test is that given by Lord Loreburn in the *De Beers* case (1)—where do the central management and control actually abide. That test explains or distinguishes the decision in *Cesena Sulphur Co.* v. *Nicholson* (4) and *Calcutta Jute Mills Co.* v. *Nicholson* (5); *Colquhoun* v. *Brooks* (6); *Mitchell* v. *Egyptian Hotels, Ld.* (7); the *Daimler* case (8); *Bradbury* v. *English Sewing Cotton Co.* (9); *New Zealand Shipping Co.* v. *Thew.* (10) In the *Swedish Railway* case (11) the company voluntarily did many things in this country; it kept its seal and had its centre of management

(1) [1906] A. C. 455, 458.
(2) [1916] 2 A. C. 307.
(3) [1925] A. C. 495, 501.
(4) 1 Ex. D. 428.
(5) Ibid. 437.
(6) (1889) 14 App. Cas. 493.
(7) [1914] 3 K. B. 118; [1915] A. C. 1022.
(8) [1916] 2 A. C. 336.
(9) [1923] A. C. 744.
(10) (1922) 8 Tax Cas. 208.
(11) [1925] A. C. 495.

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here; all of which distinguish that case from this. The view of Warrington L.J. in that case (1), that the registered office is a residence of the company, has never been asserted to be true by any supreme authority. The relevant sections of the Companies (Consolidation) Act, 1908, no doubt show a connection with this country, but that is a very different thing from saying that the residence of the company is here. The registered office must be in this country, but not the head office or the management, and the registered office is merely an address for the service of notices and letters, and is not a residence for income tax purposes.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the respondent. We submit that a company incorporated under the Companies Acts of this country necessarily has a residence here. There has never been a case under those Acts deciding that a company registered under them was not resident in this country. There are dicta in cases in which the judges have assumed that a company registered under those Acts was necessarily resident here. Those cases are *Goerz & Co.* v. *Bell* (2); *Egyptian Hotels* case (3); *American Thread Co.* v. *Joyce.* (4) In *Bradbury* v. *English Sewing Cotton Co.* (5) Lord Wrenbury was not departing from anything he had said in the *Egyptian Hotels* case. (3)

The contention that the sole place of residence of a company was the place of its central management and control was disposed of by the *Swedish Railway* case (6), in which case Warrington L.J. said in the Court of Appeal (1) that its registered office was its residence, or one of its residences. The point was not dealt with in the House of Lords, because it did not arise there; but the Lords did decide that central management and control were not the sole test.

The Companies Acts make the registered office, and we submit also the residence, of a company a condition of its continued existence. The registered office is much more than a mere address for service: the list of shareholders has

(1) [1924] 2 K. B. 255, 268.
(2) [1904] 2 K. B. 136, 146.
(3) [1914] 3 K. B. 118: [1915] A. C. 1022.
(4) (1912) 6 Tax Cas. 1, 31.
(5) [1923] A. C. 744, 764.
(6) [1925] A. C. 495.

to be kept there and be open to inspection every day; also the register of mortgages and charges. It is a residence where the vital documents of the company must be kept and produced.

Sir John Simon K.C. in reply. The word used in the Income Tax Acts is not "residence," but "resident." A man or a company may have a "residence" in a particular place, but yet not be resident there. None of the vital organic functions to which Viscount Cave L.C. refers in the *Swedish Railway* case (1) is present here. I rely upon the finding of the Commissioners.

Cur. adv. vult.

Feb. 18. LORD HANWORTH M.R. This is an appeal by the company from a judgment of Rowlatt J. given on November 22, 1926, whereby he reversed the decision of the Commissioners who had held that the company was not resident in this country for the purposes of the Income Tax Acts.

The assessments upon the company were made for the six financial years 1919–20 to 1924–25, in each of which there was a Finance Act which brought into operation the Income Tax Act, 1918, by virtue of s. 1 of that Act; and the respective assessments made upon the company are set out in para. 1 of the case stated.

They are all made under Case IV. or Case V. of Sch. D. That Schedule charges income tax "in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any trade . . . . whether the same be respectively carried on in the United Kingdom or elsewhere," in accordance with the several Cases enumerated in cl. 2 of the Schedule. The company contends that it is not resident in the United Kingdom, and thus not chargeable to the income tax in any of the years specified. The facts are set out fully in the case: it is only necessary to summarize them shortly here.

The company was incorporated in England on April 20, 1904, under the Companies Acts, 1862 to 1900, as a company

(1) [1925] A. C. 495.

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limited by shares, and its objects were to purchase and hold and develop lands, and the resources of them, in Egypt. From 1907 the business of the company has been controlled, managed, directed and carried on entirely in Cairo. No meeting of the directors has been held in the United Kingdom; the secretary general of the company has resided, and resides, in Egypt: the seal, the minute books and all books of account of the company are kept in Egypt. The Commissioners held on the facts proved before them that the company was not resident in the United Kingdom for the purposes of the Income Tax Acts, and distinguished the case from the decision in *Swedish Central Ry. Co.* v. *Thompson*. (1) The question is thus directly raised whether a company incorporated and registered in the United Kingdom, which fulfils, as this company in fact does, the obligations and duties imposed upon it under the Companies Acts, is resident here. Such obligations and duties include having a registered office in London, at which the register of members and directors, and also a register of bearer warrants, is kept. The annual summary is filed by the London secretary with the Registrar of Joint Stock Companies, and the share register is closed after advertisement published in London. A company incorporated here must also comply with ss. 100 and 101 of the Act of 1908 as to the registration and inspection of mortgages, and, if wound up, that process must be carried out here. Rowlatt J., in reversing the decision of the Commissioners, held that a company incorporated and registered here which performs, "as it must perform the duties laid upon it by Parliament," must be held to reside in this country, even though the facts show that its activities, so far as they can be without transgressing the law, are carried on elsewhere.

The subject of the residence of a company incorporated under the Companies Acts has been so recently, and so fully, discussed and considered both in this Court and in the House of Lords, in the *Swedish Railway* case (1), where the authorities are reviewed, that it is unnecessary to go over the whole of it again, except for the purpose of discovering whether the

(1) [1925] A. C. 495.

precise point to be decided in the present case has ever been determined. It is argued for the company that in effect, if not in direct terms, the question has been concluded in their favour.

Until the decision in the *Swedish Railway* case (1), it was not settled that a limited company could have more than one residence. That is no longer an open question. The Lord Chancellor in the *Swedish Railway* case (2) says: "When the central management and control of a company abides in a particular place, the company is held for the purposes of income tax to have a residence in that place: but it does not follow that it cannot have a residence elsewhere. An individual may clearly have more than one residence: see *Cooper* v. *Cadwalader* (3), and on principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; and, if so, it may have more than one residence." This judgment is concurred in by Lord Dunedin and Sumner, and supported by Lord Buckmaster.

With this decision in mind I turn back to the two cases of the *Cesena Sulphur Co.* v. *Nicholson* and *Calcutta Jute Mills Co.* v. *Nicholson.* (4) Both those companies were incorporated under the Companies Acts, 1862 to 1867. The business of each of them was abroad. The Cesena Company worked mines of sulphur at Cesena in Italy; the Calcutta company operated certain jute mills at Ishera, near Calcutta, in India. Both companies were held to be resident here, for their activities and work were directed from London. The question of dual residence was clearly referred to by Sir John Holker (5), but Kelly C.B. expressly gave no opinion upon it. Nor did Huddleston B. Their decision turned upon the answer to the question where was "le centre de l'entreprise"—to quote Huddleston B.'s phrase—and both judges held that it was where the directions were given which were translated into action in Italy and India respectively.

(1) [1925] A. C. 495.
(2) Ibid. 501.
(3) (1904) 5 Tax Cas. 101.
(4) 1 Ex. D. 428.
(5) 1 Ex. D. 437.

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It is contended that if incorporation and registration afford an affirmative answer, and indicate residence in the United Kingdom, the two cases might have been dealt with on that footing more speedily than they were upon the point argued before the Court; and attention is drawn to the observations of Huddleston B. (1), where he says that "Registration, like the birth of an individual is a fact which must be taken into consideration in determining the question of residence. It may be a strong circumstance, but it is only a circumstance." Thus it is said these cases decide that the true test of residence is the place of the control of the business. No doubt that was the test applied: but the possibility of a dual residence, and a different test as to one of them, was left open. The cases did not decide that the only possible test of residence was to ask where the place of control was.

In *De Beers Consolidated Mines, Ld.* v. *Howe* (2) it was decided that a foreign corporation registered abroad may reside in this country, and so be subject to income tax. Lord Loreburn says that "it was clearly established that the majority of directors and life governors live in England, that the directors' meetings in London are the meetings where the real control is always exercised in practically all the important business of the company except the mining operations": and he refers to the finding of the Commissioners that the trade or business of the company was carried on within the United Kingdom, and that the head seat and directing power of the affairs of the company were at the office in London. Upon those conclusions of fact, it followed, in accordance with the decisions in the *Cesena* and *Calcutta* cases (3). that the company was resident within the United Kingdom. Lord Loreburn adheres to the above decisions, and regards the true question to be, where is the company's real business carried on? He rejects the test proposed by Mr. Cohen, that a company resides where it is registered and nowhere else. It would, in my judgment, be improper to treat that rejection as connoting a decision

(1) 1 Ex. D. 453. (2) [1906] A. C. 455, 459.
(3) 1 Ex. D. 428.

that the incorporation and registration of a company cannot indicate the residence of a company. Dual residence was not considered. What was advanced was that a company can only have one residence—namely, the place of its foundation. (1) Without overruling the *Cesena* and *Calcutta* cases (2), that argument could not have been accepted; and these latter cases were followed, for they had stood for thirty years. I cannot accept this decision as affirming the proposition that a company can only have one residence, and that that one is where the central management and control of the business abide. The words of Lord James of Hereford appear not inconsistent with the proposition of dual residence.

The passage cited in the argument from Lord Parker in *Daimler Co., Ld.* (3), does not appear germane to the present question, for the problem to be solved in that case was very different from the present, and his observations, concurred in no doubt by other noble Lords, were delivered alio intuitu.

In *Goertz & Co.* v. *Bell* (4) Channell J. suggests that a company may have two residences and he gives reasons for thinking that the place where a company is incorporated may be its "local habitation": and Phillimore J. appears to approve of the judgment of Channell J.: see the *De Beers* case. (5)

Egyptian Hotels, Ld. v. *Mitchell* (6) was much discussed in the *Swedish Railway* case (7), and in the present. It is sufficient to recall, as the Lord Chancellor did in his speech in the *Swedish Railway* case (7), that the decision in the former case is only consistent with the basis of dual residence, the one according to the decisions in the *Cesena* and *Calcutta* cases (2) being in Egypt, the other—which attracted the income tax—where it was registered in this country. Lord Wrenbury had said in his judgment in *Egyptian Hotels, Ld.* v. *Mitchell* (8) in the Court of Appeal: "This company is incorporated in the United Kingdom; it is therefore here." An attempt was made to show that he had modified that

(1) [1906] A. C. 455, 456.
(2) 1 Ex. D. 428.
(3) [1916] 2 A. C. 339.
(4) [1904] 2 K. B. 136, 146.
(5) [1905] 2 K. B. 632, 633.
(6) [1914] 3 K. B. 118.
(7) [1925] A. C. 495, 504.
(8) [1914] 3 K. B. 118, 132.

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opinion by what he said in his judgment in *Bradbury* v. *English Sewing Cotton Co.* (1), but I do not take that view of the passage. I think that the paragraph of Lord Wrenbury's speech (2) beginning: "in truth the place of registration," must be read as referring to registration abroad. This would make the antithesis between that paragraph and the proposition stated in the next paragraph, which deals with registration in the United Kingdom complete. It also protects the paragraph from the wide interpretation that is suggested for it. In the previous and cognate case of *American Thread Co.* v. *Joyce* (3) Lord Wrenbury had stated in wider terms the more compressed statement that he repeated in *Egyptian Hotels, Ld.* v. *Mitchell.* (4) His words are: "A corporation like an individual may have more than one place of residence. The place which immediately occurs to one as presumably its place of residence is the place of incorporation. That has been spoken of in some of the cases as the place of its birth; it is the place of its birth, but is more than that; it is the place whose laws determine its status, it is according to the law of that place that it is a corporation; and therefore it is not only its birth but its status which depends upon the place in which its incorporation takes place, and it would be difficult, I think, to say under any circumstances the place of incorporation may not, for some purposes at any rate, as for instance with regard to jurisdiction, be always the place of residence."

Further, Lord Dunedin in the *Swedish Railway* case (5) said that it is impossible to hold that the test of where the business was really managed alone affords a test of the sole residence possible in the case of a company.

From this examination of the authorities, it appears, first, that on the question of the dual residence of a company there is no sufficient authority for holding that the seat and control of the business afford the only test of residence or residences, and, secondly, there is authority for holding

(1) [1923] A. C. 767.
(2) Ibid. 765.
(3) 6 Tax Cas. 31.
(4) [1914] 3 K. B. 118.
(5) [1925] A. C. 495.

that the place of incorporation—the place whose laws determine its status, and the social contract between the shareholders—ought to be held to be one of the company's residences.

Warrington L.J. in the *Swedish Railway* case (1) definitely stated that he was prepared to hold that "the registered office is a residence of the company, and that it must be regarded as residing there, at whatever other place at home or abroad it may also reside."

Atkin L.J. (2) said: "In principle I should have said that the place of incorporation and of registered office is conclusive of residence." It must be noted that a little earlier he had postulated "place of incorporation, registered office, and perhaps in addition some functional activity" as forming a residence of a company.

The Lord Chancellor's words in his speech in the *Swedish Railway* case (3), that he was "not at present prepared to say that registration in the United Kingdom would itself be sufficient proof of residence here," do not exclude the possibility that registration coupled with the functional activity required by law would be held by him to be sufficient.

Lord Buckmaster described registration as "one of the critical facts in the determination of residence in this country, but not necessarily the sole and exclusive fact."

Upon these authorities, in my judgment the decision of Rowlatt J. is right.

Let me turn to the alternative. A company can have more than one residence. The place where the business is managed and controlled does not alone afford the test of the sole residence possible in the case of a company. Is it possible to hold that a company incorporated and registered here, which owes its status to the laws of this country, which has to do, and does, certain acts in conformity with those laws, and cannot cast aside those duties; whose shareholders' rights and whose dissolution are regulated by those laws can claim to be non-resident here? If the matter is to be

(1) [1924] 2 K. B. 268. (2) [1924] 2 K. B. 281.
(3) [1925] A. C. 495, 505, 519.

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determined by analogy, I should affirm that a man with a local habitation, and bound by, and compelled to do certain acts in accordance with, local laws, even if his compliance with them were in some measure formal, could not prevent the inference being drawn that he "kept house" in that locality. For these reasons the appeal must be dismissed with costs.

SARGANT L.J. This appeal raises the general question whether a company incorporated under the Companies (Consolidation) Act, 1908, as a company limited by shares must necessarily be liable to income tax under the Income Tax Act, 1918.

The incorporation of the company now in question did in fact take place in the year 1904 under the Companies Acts, 1862 to 1900; but this fact makes no difference, since s. 245 of the Act of 1908 provided for the application of that Act to the company as if it had been formed and registered under that Act as a company limited by shares. And though, as appears in para. 9 (2.), of the case, a contention was at one time raised on behalf of the Crown that there were certain optional activities of the company or their secretary which might accentuate the liability of the company to income tax, no stress was laid on these activities in the argument before this Court. The Crown throughout relied on the broad general proposition that the Act of 1908 imposed continuing obligations on all companies registered under that Act, and, at any rate, on all companies registered like this company as companies limited by shares, which necessarily involved a residence here on their part sufficient to render them liable to income tax.

The authorities on the question have already been examined in the judgment of the Master of the Rolls, and I do not propose to make any further examination of them. They seem to me to tend very strongly in favour of the contention of the Crown, and to be almost, if not quite, conclusive so far as this Court is concerned. For in the *Swedish Railway* case (1) Warrington L.J. distinctly expressed as one of

(1) [1924] 2 K. B. 268.

the foundations of his judgment the view that a company registered under the Companies Act must necessarily have a residence here for the purposes of income tax; Atkin L.J. apparently took the same view, though somewhat less emphatically. And though on appeal to the House of Lords the Lord Chancellor, in an opinion concurred in by the majority of the House, preferred to base his decision on the view that the fact of registration together with certain other comparatively trifling circumstances entitled the Commissioners to find that the Swedish Railway Company had a residence here, I do not think that he intended to cast any doubt on the views of Warrington and Atkin L.JJ., or to do more than to keep the general question open so far as the ultimate tribunal was concerned.

The important difference between the *Swedish Railway* case (1) and the present is that there the Commissioners found as a fact that the company had a residence in England, while here they have arrived at a nearly contrary, though somewhat mixed finding of fact and law, that the company "was not resident in this country for the purposes of the Income Tax Acts." While, therefore, in the former case it was sufficient for the Crown to prove that there were facts on which the Commissioners could come to the conclusion they did, it is incumbent on the Crown in the present case to demonstrate that the facts are such as to prevent the Commissioners from arriving at their conclusion against residence here. Whether or no they are so prevented depends on a somewhat closer examination of the relevant provisions of the Act of 1908 than apparently took place in the *Swedish Railway* case. (1)

Under s. 2 of that Act a company limited by shares may be incorporated by seven persons subscribing a memorandum of association and otherwise complying with the requirements of the Act in respect of registration. Under s. 3 in the case of such a company the memorandum must state (inter alia) (1.) the name of the company; (2.) the part of the United Kingdom in which the registered office is to be situate;

(1) [1925] A. C. 495.

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(3.) the objects of the company, and (4.) the amount of share capital and the division thereof into shares: under s. 7 the company may not alter its memorandum except as provided by the Act; under s. 8, sub-s. 3, a company cannot alter its name except with the approval of the Board of Trade; and under s. 9 any alteration of the memorandum of a company cannot take effect until it has been approved by the Court as therein mentioned. Under s. 15 the memorandum and articles, if any, are to be delivered to the registrar in the appropriate part of the United Kingdom, and are to be registered by him. And upon registration of the memorandum the registrar is to certify the incorporation of the company, and upon and from the date certified by him the subscribers of the memorandum and future members of the company become and are a body corporate with a common seal.

Under s. 25 of the Act every company has to keep a register of its members and in default is liable for penalties; under s. 26 every company limited by shares has to make a detailed annual return to the registrar of (inter alia) the shares issued, the amounts of calls made, received and unpaid, any amounts paid for commission on the issue of shares and debentures, the names and addresses of the directors of the company, and the total amounts of all debts due from the company in respect of mortgages and charges registrable by the company. Under s. 30 the register of members is to be kept at the registered office of the company and is to be open to inspection as therein provided; under s. 32 power is given to the Court, on proper application, to rectify the register; and under s. 34 companies are empowered to keep registers in any colony of members registered in such colony, but in such case a duplicate of a colonial register is to be kept at the registered office.

A company limited by shares may, under s. 45, reorganize its share capital as therein mentioned, but any such reorganization must be confirmed by the Court in order to be effective; and where such an order of the Court has been made an office copy thereof has to be filed with the registrar within seven days. Further, under s. 46 such a company

may reduce its capital, but here again it is essential to the efficacy of the reduction that it should be confirmed by the Court, and when this has been done the registrar has to register the order of the Court and a minute approved by the Court of the altered state of the company's capital.

Under s. 62 of the Act every company must have a registered office to which all communications and notices may be addressed, and notice of the situation of the registered office and of any change therein has to be given to and recorded by the registrar. It would seem, though it is not so stated in terms in s. 62, that by virtue of s. 3 the original or changed office must be within the United Kingdom. At any rate this is so in the case of the company now in question. Under s. 63 the name of the company is to be placed conspicuously outside every office or place of business; and under s. 75 every company is to keep at its registered office a register of the names, addresses and occupations of its directors or managers, and to keep the registrar informed thereof. Sect. 93 of the Act provides for the forwarding to the registrar of companies of particulars of mortgages and charges on the property of companies, for the keeping by him of a register thereof, for the inspection of that register, and for the keeping by the companies at their registered offices of copies of such mortgages and charges.

Sect. 96 enables the Court to extend in certain cases the time for registering any mortgage or charge. Sect. 100 compels companies to keep a register of mortgages; and s. 101 enables inspection of this register and of the copies of mortgages kept by companies under s. 93. Under s. 109 power is given to the Board of Trade to appoint inspectors to investigate the affairs of any company and to report thereon in such manner as the Board direct. Under s. 112 in default of the appointment by a company of auditors at each annual meeting the Board of Trade may, on the application of any member, appoint auditors. Under s. 116 any document may be served on a company by leaving it at or sending it by post to the registered office of the company. Under s. 130 a company is deemed to be unable to pay its

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debts and so to be liable to be wound up compulsorily if a creditor for over 50*l.* has served on the company by leaving the same at its registered office a demand requiring the payment of the debt and the company has defaulted for three weeks; and under s. 131 the Courts having jurisdiction to wind up companies registered (as this company is) in England are the High Court, the Chancery Courts of the Counties Palatine of Lancaster and Durham and the county courts.

The cumulative effect of the foregoing sections is, in my judgment, decisive and leads irresistibly to the conclusion that a company regulated by the Companies (Consolidation) Act, 1908, has a residence (though not necessarily a sole residence) in this country analogous to the residence of an individual. Such a company from its incorporation, or birth, onwards is subjected to continuing statutory regulations which define the limits of its powers towards others, and control the relations of the company to its members and of the members inter se in most important and, indeed, vital respects. Though the centre of the company's business activities and the main direction and management of its external affairs may be in Egypt, the centre of its constitution as a company and of its domestic arrangements is definitely fixed in this country and at its registered office. It is here that the company is compelled to keep the particulars of its capitalization, its membership and its liabilities to debenture holders and mortgagees. It is here that the company can always be found and communicated with, and that it can be served with notices, including notices to pay debts, so as to become amenable to winding up in case of default. Further, it is through the medium of the registrar of companies and the Courts of this country that the various obligations of the company that have been referred to have to be enforced. And it is by the necessity of complying with the statutory prohibitions as to reduction of capital except with the leave of the Court and the statutory regulations as to the registration of mortgages, as to the appointment of auditors and as to the publication of the names of the directors, that the

financial credit and stability of the company are assured. In my judgment the provisions of the Act of 1908 not only enable a company to be born here, but necessarily keep the company domiciled here throughout its existence. And, though residence is less than domicil, and may often occur without domicil, yet I doubt whether an obligatory and continuous domicil in England, such as seems to me to result from the provisions of the Act of 1908 in the case of such companies as this, does not necessarily involve residence at the place of domicil. But however this may be, the requirements of the Act are, in my judgment, such as to keep the company here, and make it "at home" here, to such an extent as to give it a notional residence in this country sufficient to incur liability to income tax.

I agree, therefore, that the appeal should be dismissed with the usual consequences.

LAWRENCE L.J. I agree. The difficulties which frequently arise in determining whether a corporation is residing in the United Kingdom for the purposes of liability to income tax are abundantly illustrated by the cases cited by counsel during the hearing of this appeal, which demonstrate that the application by analogy to a corporation of the considerations determining the residence of a human being is in many instances far from easy. In the present case, however, the neat point to be determined is whether a limited company incorporated in England under the Companies Acts is or is not necessarily residing at its registered office in England for income tax purposes, even although it has the centre of its affairs abroad where its business activities are conducted and where all its general and board meetings are held. This point is one of general application, and, if answered in the affirmative, frees all similar cases in the future from the uncertainty as to the facts which have hitherto determined the residence of a company incorporated under the Companies Acts.

In view of the judgments of Warrington L.J. in the *Swedish Railway* case (1) and of the Master of the Rolls and Sargant L.J.

(1) [1924] 2 K. B. 268.

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Lawrence L.J.

in the present case (in which judgments I entirely concur) it would only result in needless repetition if I were to state at any length the reasons which have led me to the conclusion that the decision of Rowlatt J. in this case is right.

In my opinion it is one of the basic conceptions of the scheme as formulated by the legislature in the Companies Acts that a company incorporated under those Acts will during its entire existence have a permanent home in that part of the United Kingdom in which the memorandum of association states that its registered office is to be situate, and further that such home will be its registered office at which it must fulfil its statutory obligations and at which (wherever else it may reside or carry on its business) it can always be found in residence by its creditors, by its shareholders, by the registrar of companies, and by the Board of Trade. This I think is clearly shown by the elaborate provisions contained in the Acts for safeguarding the interests of creditors and shareholders, many of which provisions would be rendered more or less futile if the company could remove itself from the country where it was incorporated and could set up its abode exclusively in some distant foreign land. To mention only a few of these provisions, the company and those responsible for the conduct of its affairs are subjected to the jurisdiction of the Courts of this country, and all offences made punishable by any fines may be prosecuted under the Summary Jurisdiction Acts; the rights and liabilities of the shareholders are defined and regulated exclusively by reference to the law of this country, and are enforceable in the Courts of this country; the company is bound to keep its register of members and register of charges at its registered office and to give facilities for inspection there; the company is prohibited from reducing its capital except by the leave of the Courts of this country; the company has to keep in close touch with the registrar of companies, with whom it has to file various documents and to whom it has to make various returns; and the Board of Trade is given power to cause an investigation to be made into the company's affairs. In contrast to these provisions

is the power conferred on the company on certain conditions to keep a branch register of members in any colony where it transacts business (s. 34 of the Companies (Consolidation) Act, 1908), to authorize the execution by an attorney of deeds outside the United Kingdom (s. 78), and to have for use abroad a seal which must be a facsimile of its common seal with the addition on its face of the name of the country, district or place, where it is to be used (s. 79). All these provisions seem to me to negative the idea that the company is at liberty to reside exclusively abroad and to treat its registered office merely as an address for service, as was suggested by the appellants' counsel.

It would indeed seem strange if a company, having obtained the privileges of incorporation in England on the condition that its registered office will be situate in England and that it will comply with all the requirements of the Companies Acts, could after incorporation abandon its English residence and yet retain all the advantages incident to its status as an English company. The analogy of the birth in England of a human being who subsequently goes to reside permanently and exclusively abroad does not seem to me to be applicable to an English company incorporated under the Companies Acts; such a company is a mere creature of the legislature, and not only its birth but its subsequent existence and status seems to me to be dependent entirely on its constant compliance with the conditions laid down by the legislature, for which purpose I think that it is essential that it should be and remain resident at its registered office in England. If this view be sound there cannot, I think, be any doubt that every company incorporated under the Companies Acts is residing at its registered office for the purpose of liability to income tax.

In my opinion the appeal fails and ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *Herbert Smith & Co.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

R. M.

C. A.

1927
April 5, 6.

[IN THE COURT OF APPEAL.]

HART *v.* RIVERSDALE MILL COMPANY, LIMITED.

Master and Servant—Wages earned—Mode of Calculation—Bad Work—Deductions—Truck Act, 1831 (1 *&* 2 *Will.* 4, *c.* 37), *ss.* 3, 4—*Truck Act*, 1896 (59 *&* 60 *Vict. c.* 44), *ss.* 2, 9.

The appellant was employed by the respondents as a cotton weaver at their mill at Bolton, Lancashire, under a customary contract whereby the respondents were to find the warp and the weft, and the appellant was to weave it into cloth. It was the duty of the appellant to weave a good merchantable cloth by performing her work without negligence. She was to be paid according to a standard list, an implied condition of which was that the prices in the list should apply to a good merchantable cloth. If the workmanship of a weaver was bad or negligent, there was a custom to pay a sum less than that in the list—namely, the standard list price less compensation assessed by the employer of a reasonable amount for the loss suffered by him for damage to his cloth. The appellant was negligent in performing her work, and the respondents deducted 6*d.* for bad work from the standard list price, which was admitted to be a fair and reasonable sum and less than the actual loss caused to the respondents. On her complaint the justices found that the sum of 6*d.* was illegally deducted in contravention of s. 3 of the Truck Act, 1831, and gave a verdict for the appellant for that amount, and for the respondents for 1*s.* upon a counterclaim for the damage sustained by them.

By an Order made by the Secretary of State under s. 9 of the Truck Act, 1896, exemption from the provisions of that Act was granted to persons engaged in the weaving of cotton in Lancashire. (1)

On appeal the Divisional Court (Avory and Salter JJ., Lord Hewart C.J. dissenting) held that the decision of the justices was wrong:—

Held, by the Court of Appeal, that, upon the facts found in the case stated by the justices, the question was one of contract and not of breach of contract; that the deduction which had been made was not a separate and independent deduction from rightly ascertained wages, but was a loss which accrued to the workman in the true calculation of what sum she ought to be paid for wages; and that consequently the respondents had not contravened the provisions of s. 3 of the Truck Act, 1831.

Decision of the Divisional Court [1927] 1 K. B. 624 affirmed.

Chawner v. *Cummings* (1846) 8 Q. B. 311; and *Archer* v. *James* (1859) 2 B. & S. 61 applied.

Decisions of an inferior court which stand because on appeal the superior Court is equally divided are binding on Courts of co-ordinate jurisdiction with that superior Court.

APPEAL from a decision of the Divisional Court (2) upon a case stated by the justices of Bolton.

(1) See per Avory J. [1927] 1 K. B. 631. (2) [1927] 1 K. B. 624.

At a court of summary jurisdiction a complaint was preferred by Nellie Hart (hereinafter called "the workman") under the Employers and Workmen Act, 1875, against the Riversdale Mill Company, Ld. (hereinafter called "the employers"), claiming the sum of 6*d*., the balance of wages alleged to be due to her as a weaver in the service of the employers and unlawfully deducted from the workman's wages.

The court found that the sum of 6*d*. was illegally deducted, and gave a verdict for the workman for that amount. They also gave a verdict for the employers on a counterclaim for 1*s*. in respect of damages sustained by them through the negligence of the workman during her contract of service. Upon the hearing of the complaint the following facts were proved or admitted :—

That the workman was negligent and that the 1*s*. claimed by the employers was a fair claim for the damage done to their cloth through the negligence of the workman.

The workman was employed by the employers as a cotton weaver at their cotton weaving mill at Darcy Lever, Bolton, Lancashire, under a customary contract of service whereby the employers were to find the warp and the weft and the workman was to weave the same into cloth.

It was the duty of the workman to weave a good merchantable cloth by performing her work without negligence and in a careful manner. The workman was to be paid for her work according to a "standard list," an implied condition of which was that the prices in the list should apply to a good merchantable cloth produced by the observance by the workman of her duty as a weaver.

In the event of the material provided by the employers being defective, there is a practice to pay a sum higher than that contained in the standard list as payment for extra work due to defective material.

If the workmanship of a weaver was bad or negligent, there is, and has been for many years a custom to pay a sum less than that contained in the standard list—namely, the standard list price less compensation assessed by the employer

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of a reasonable amount in respect of the loss suffered by the employer for damage to his cloth. It was admitted that the deduction of 6*d.* made in this case for bad work was fair and reasonable and less than the actual loss caused to the employers.

Deductions for bad work are, and have been for many years, the usage and custom in the cotton weaving trade of Lancashire, and have always been, and are, an incident of a weaver's contract of service, and have always been, and are, taken into account in calculating the correct wages. It was admitted by the employers' witnesses that fines and deductions for bad and negligent work had always been objected to on principle by the workmen as a class.

The justices, being of opinion that the standard list was the rate of wages applicable, held that the employers had illegally deducted 6*d.* by way of fine from the wages of the workman. The amount paid to the workman was 8*s.* 5½*d.*, being 8*s.* 11½*d.*, the "standard list" price, less 6*d.* deduction for bad work.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

By an Order made on March 3, 1897, under s. 9 of the Truck Act, 1896, the Secretary of State granted exemption from the provisions of that Act in respect of persons engaged in the weaving of cotton in the county of Lancashire.

The employers appealed, and the Divisional Court (Avory and Salter JJ., Lord Hewart C.J. dissenting) reversed the decision of the justices. (1)

The workman appealed. The appeal was heard on April 5 and 6, 1927.

Eastham K.C. and *Laski* for the appellant referred to *Chawner* v. *Cummings* (2); *Archer* v. *James* (3); *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (4); and *Pritchard* v. *James Clay* (*Wellington*), *Ld.* (5)

(1) [1927] 1 K. B. 624.
(2) 8 Q. B. 311.
(3) 2 B. & S. 61, 86.
(4) [1906] A. C. 136.
(5) [1926] 1 K. B. 238.

Sir John Simon K.C., *Cyril Atkinson K.C.* and *H. Derbyshire* for the respondents were not called upon.

LORD HANWORTH M.R. This is an appeal from a decision of the King's Bench Division. I have come to the conclusion that the appeal fails, and I agree with the decision given by the majority of the Divisional Court.

The point arises on a case stated by the justices who heard a complaint brought by Nellie Hart against her employers, the Riversdale Mill Company, Ld., that they had illegally deducted from wages payable to her a sum of 6*d.* in respect of a claim or a deduction, so it is called, which they made because the work which she did as a weaver was not satisfactory. Nellie Hart was employed by the company as a weaver, and the case stated sets out the facts relevant for our decision. The justices before whom Nellie Hart's claim was presented came to the conclusion that the rate of wages which was payable to her was contained in what is called the "standard list" of figures, which is annexed to the case, and that the employers had illegally deducted 6*d.* by way of fines from her wages, and they therefore gave a verdict for the workman for the sum of 6*d.* When the case was before the magistrates what is called a counterclaim was presented on behalf of the employers, and it was to the effect that they were entitled to the sum of 1*s.* in respect of the bad work which had been done by the workman who was presenting the claim to the justices.

The question we have to decide is whether or not this so-called deduction of 6*d.* is illegal on the ground that it is prohibited by the Truck Act. Speaking for myself, I should be very sorry to make any serious criticism upon the Truck Act, or to find that it did not effect its purpose, which was to secure that the workman should be paid the wages earned by him in their entirety and that there should not be an illusive mode of payment whereby the employer was able to give to the workman something which pretended to be of value, but which was not of true value, and which enabled the employer to defeat the just rights of the workman by

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paying him in kind, or in some manner which was not consonant with the true payment. The Truck Act, 1831, was passed for the purpose of ensuring liberty and freedom to the employee and to prevent the employer from defeating the just rights of the workman. Sect. 3 of the Act of 1831 says this. [His Lordship read the section and continued.]

The facts before us are presented in the case stated by the justices, and we must take the facts as they are therein presented. They are that for the purposes of the case it is admitted that the workman was negligent, and that the sum of 1*s.* claimed by the counterclaim of the employers was a fair claim for the damage done to the employers' cloth through the negligence of the workman. Then in the next paragraph we have stated the terms of employment on which the contract of service was made between the parties. It is stated in these words: "The workman was employed by the employers as a cotton weaver at their cotton weaving mill at Darcy Lever, Bolton, Lancashire, under a customary contract of service whereby the employers were to find the warp and the weft and the workman was to weave the same into cloth. It was the duty of the workman to weave a good merchantable cloth by performing her work without negligence and in a careful manner."

I observe that in the paragraph I have already read it is admitted for the purposes of this case that that term had not been fulfilled. The next paragraph is: "The workman was to be paid for her work according to a 'standard list,' an implied condition of which was that the prices in the list should apply to good merchantable cloth produced by the observance by the workman of her duty as a weaver. In the event of the material provided by the employers being defective, there is a practice to pay a sum higher than that contained in the standard list as payment for extra work due to defective material."

Then in paras. 10 and 11: "If the workmanship of a weaver was bad or negligent, there is, and has been for many years, a custom"—I think a better word would be "practice"—"to pay a sum less than that contained in the standard

list—namely, the standard list price less compensation assessed by the employer of a reasonable amount in respect of the loss suffered by the employer for damage to his cloth."

An admission is made for the purposes of the case that the deduction of 6*d.* made in the present case for bad work was fair and reasonable, and was, indeed, less than the actual loss caused to the employers. It is also found that: "Deductions for bad work are, and have been for many years, the usage and custom in the cotton weaving trade of Lancashire and have always been, and are, an incident of a weaver's contract of service, and have always been and are taken into account in calculating the correct wages."

There is an additional finding that that system of fines and deductions has been objected to on principle by the workmen as a class; but I am unable to read the clauses of the case which I have read otherwise than as presenting these facts for the consideration of the Court—namely, that the contract of service between the employers and the weaver was one under which, as incident to that service, the deductions for bad work are taken into account in calculating the correct wages. In other words, that it is a term of the contract of service, that notice should be taken of any injury done to the work by the workman and that an estimate should be made of what is the value, or rather the depreciation caused by that bad work, and that a reasonable amount is to be estimated in respect of it, and that it is to be taken into account in calculating the correct wages. Now in para. 12 we have recorded the fact that there was a sheet from the wages book produced, but it was a sheet from a book which is not signed by the workman, and I desire to say for the purposes of my judgment that I have disregarded that exhibit in the case entirely. In the standard list to which attention has been drawn, Mr. Eastham has pointed out that a certain standard of width of looms and the character of the looms is stated. I need not go over the pages to which he called our attention, but it is also noticeable that provision is made whereby if the material supplied by the employer

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is not of a standard quality, so that more work is called for by the workman than he would have to put out upon good warp and weft, the employer has to pay on a somewhat higher scale. Obviously the question whether the quality of the material supplied is good or indifferent may lead to difficulties and to disputes, and on p. 122 of the little book to which we have been referred, we find approximately a scheme providing for the decision of those disputes arising upon a complaint of bad material, and also a provision that if and when that dispute, whether there has been bad material supplied, has been determined, then the weaving price and the time at which it should take effect should be mutually arranged between the employers' association and the operatives' association; and then there is a clause which deals with the question of an under-payment based upon what ought to be paid in the event of there being bad materials supplied. It appears, therefore, that, upon this list of prices and upon the facts found by the justices, this contract of service between the workman and her employers provided that deductions for bad work are to be taken into account in calculating the correct wages, and equally, if there is to be a new price or a different price beyond the scale of prices for labour in the standard list, there is also to be a calculation of the price which is to be paid which will give compensation to the workman who has had bad material supplied to him.

It is argued that in the present case the employers have deducted 6*d.* in respect of this negligent work from the wages payable to Nellie Hart, and the point is put that, if they have deducted 6*d.*, they have not then and there paid the entire amount of the wages earned or payable to the artificer, and have committed a breach of s. 3 of the Truck Act. If, however, before the wages are ascertained a calculation is to be gone through which involves the possibility of a deduction being made in respect of bad work, or an enhancement of the wages being paid in respect of bad material, unless and until that calculation has been made, it is impossible to determine what is the entire amount of the wages earned. It is said that this incident is contrary to the Truck Act;

that the wages must be determined according to this standard list, which will give a particular figure, or the basis of a particular figure, to the workman, whereas if there are to be deductions it would be difficult for the workman to know what are the wages to be paid; and attention is called to s. 116, sub-s. 1 (*b*), of the Factory and Workshops Act, 1901, which provides that "In the case of weavers in the cotton trade, the particulars of the rate of wages applicable to the work to be done by each weaver shall be furnished to him in writing at the time when the work is given out to him, and the basis and conditions by which the prices are regulated and fixed shall also be exhibited in each room on a placard not containing any other matter and posted in a position where it is easily legible." All that is very important and very true, but I have to come back to the facts that implied as a term of the contract of service individually made by the workman with her employer, there was this system of making deductions for bad work, and those deductions are taken into account in calculating the correct wages. In other words, although you have a standard of price set out on the standard list, before you get to the entire amount of the wages earned you have to calculate the hours worked, or if it is piecework the amount done, and you have to take the basic standard on which the rate depends, and even then you have not completed your calculation, for you must also decide whether there is any deduction to be made in respect of bad work, just as you must determine whether there is to be any addition made in respect of bad material supplied by the employer. Unless and until you have gone through that process and come to a conclusion what is the true figure on the calculation of those several matters, you do not get to the entire amount of the wages earned. In *Chawner* v. *Cummings* (1), decided in 1846, and which still stands good, Lord Denman C.J. said: "Then, are these deductions in the nature of payment at all? It seems to us to be the mode of calculating the amount of wages, and nothing more. Whether the arrangement took place at the beginning or end

(1) 8 Q. B. 311, 323.

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of the work, makes no difference; because it is stated that the deductions were made according to the usage of the trade, and that the plaintiff knew it, and was dealt with accordingly. The plaintiff, therefore, must be presumed to have contracted upon the usual and well-known terms; and his wages so ascertained have been actually received by him in the current coin of the realm."

It appears to me that those words are closely applicable to the present case. There was another case of *Archer* v. *James* (1) in which the decision of *Chawner* v. *Cummings* (2) was questioned, but the Exchequer Chamber was divided by three judges on either side, with the result that *Chawner* v. *Cummings* (2) still stands good. But in *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (3), Lord Davey says this of *Chawner* v. *Cummings* (2): "three other judges, on the other hand, approved the decision and held that the deductions in question in the case before them were in the same category and were elements only in calculating the real amount of the workman's wages. But there is not a word in any of the judgments which supports the contention that when the amount of the wages is ascertained the employer can discharge himself by set-off or payment in account." That sentence of Lord Davey seems to put the point we have to decide in the present case very shortly. Is this deduction or the sum of which the workman has been deprived a sum she has been deprived of in calculating the real amount of her wages; or is it a sum which, after the wages have been ascertained, has been used by the employer to discharge himself pro tanto of the wages which ought to be paid in their entirety to the workman? For the reasons which I have given and on the facts of this case, it appears to me quite clear that the reasoning of Lord Denman C.J. in *Chawner* v. *Cummings* (2) applies; that the case of *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (3), does not apply, and that the sum of which Nellie Hart has been deprived is not a sum deducted from the wages which were first found to be due to her, but is a loss which she has

(1) 2 B. & S. 61. (2) 8 Q. B. 311.
(3) [1906] A. C. 136, 143.

sustained in the course of the proper and just ascertainment of what is the right sum to be paid to her as wages after appropriate and proper calculations have been made. If that be the true nature of this loss which she has suffered, it is not a deduction and the employers have not offended against s. 3 of the Truck Act, 1831. This decision is to my mind further supported by the observations which were made by Avory and Salter JJ. and the reasoning which arises on the Truck Act, 1896, an Act which does not apply and has been prevented from applying to the present point, but the words of which are strong to show that previously to that Act and apart from it, it is possible for a calculation of this nature to be made in order to arrive at the true wages payable. The deduction that has been made is not a separate and independent deduction from the ascertained and rightly ascertained wages, but is, as I have said, a loss which accrues to the workman in the true calculation of what sum she ought to be paid as wages.

For these reasons it appears to me that the appeal fails and must be dismissed with costs.

SCRUTTON L.J. That this case is not free from difficulty is obvious from the fact that the judges of the Divisional Court in carefully reasoned judgments differed amongst themselves, and that in the case of *Archer* v. *James* (1), when six judges sat in the Exchequer Chamber on a somewhat similar question, three of them took one view and three the other. Having given the best consideration I can to the arguments addressed to us by Mr. Eastham and Mr. Laski and the judgments in the Court below I have come to the conclusion that the view taken by Avory and Salter JJ. is correct, but I think it right shortly to state the reasons for which I have come to that conclusion.

The subject-matter is that a workman did some work badly and the employer reduced the wages, which would have been payable to the workman if the workman had done the work properly, by a sum of 6*d.*, which is found to be a fair and reasonable deduction and less than the actual loss caused

(1) 2 B. & S. 61.

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to the employer, which actual loss is found to be 1*s.*, a difference due to the negligence of the workman in carrying out the weaving of the cloth. Now there are two ways of looking at it, and stating the two ways states the whole question in the case. Is this a case where the wages of the workman have been calculated having regard to the character and quality of the work done, with the result that they are 6*d.* less than they would have been if the work had been done properly and according to standard? Or is it a case where the workman has been engaged to do work for a named sum and has done it negligently and there is a counter-claim for damages for breach of contract which it is sought to use to diminish the amount properly payable on the claim for wages? In settling which of those two is right, we are bound by the facts found in the case, and in my view the facts found in the case show that it is a question of contract and not of breach of contract. The case finds that deductions for bad work are and have been for many years the usage and custom in the cotton weaving trade in Lancashire, and have always been and are an incident of the weaver's contract of service, and have always been and are taken into account in calculating the correct wages. That seems to me to be a finding that by the contract between the employer and the workman, the wages depend on the quality of work and that if starting with standard wages you get work which is not standard work tendered to you, it is a matter of contract that the wages should be so much less than they would have been if the standard work had been performed properly, and that it is a term of the contract that the compensation shall be a reasonable compensation fixed by the employer, as it is found to be in this case. It was found to be a reasonable compensation.

Counsel for the appellant laid stress on two other facts; they stressed the finding "It was admitted by the employers' witnesses that fines and deductions for bad and negligent work had always been objected to on principle by the workmen as a class." I am quite unable to see how that affects the finding on the contract—that it is common for people

who are working under certain terms to object to them as a principle and desire them to be something else. The people who have been working seven hours in the mines and are now working eight hours a day I have no doubt object on principle to the eight hours day; they much prefer the seven hours day on which they previously worked; but still there is the contract to work eight hours a day and it is a contractual obligation which is not in any way affected by the fact that the workmen object to it as a class on principle. The other statement is the statement in para. 9 that there is a practice; in para. 10, a custom; in para. 11, for many years the usage and custom. As I understand, it is said you cannot have a custom because under the Truck Act it is illegal, but of course that depends whether it is illegal under the Truck Act. If it is not illegal under the Truck Act, there is no objection to the finding about custom.

The position under the Truck Act and the authorities stand in this way: the Truck Act, 1831, provides that the entire amount of the wages shall be actually paid to the artificer in the current coin of the realm and not otherwise. That is to say you cannot pay by giving him corn or something which you fix as your own price. You cannot pay him by deducting from the wages which you ought to pay to him sums for some other purpose; and it is said this is a deduction from the wages he would otherwise have had. Now that class of case came before the Courts very early, because apparently at the time when the Truck Act was passed there had been for over 100 years in some trades a practice of dealing with or calculating wages in a particular way. You fixed, as I understand, in most trades the wages on the assumption that the workman supplied the material and plant, but if he did not, you reduced the wages which you would pay him by deducting something for the supply of material and something for the use of plant, and so on. Very soon after the Truck Act the question arose: Is this way of fixing wages forbidden by the Truck Act?

First of all in *Chawner* v. *Cummings* (1) in 1846, the question

(1) 8 Q. B. 311, 323.

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arose whether certain deductions from the ordinary wages—because the employers supplied the frame, the use of premises, a boy to wind the yarn and so on—were deductions of fixed amounts for those items and were forbidden by the Truck Act. Lord Denman C.J. said: "Are these deductions in the nature of payment at all? It seems to us to be the mode of calculating the amount of wages, and nothing more. Whether the arrangement took place at the beginning or end of the work, makes no difference; because it is stated that the deductions were made according to the usage of the trade, and that the plaintiff knew it." Therefore it was held in 1846 that such a way of calculating wages, having an initial amount and deducting from it to get the actual wages as payment for things supplied by the employer to carry out the work, was not contrary to the Truck Act.

In *Archer* v. *James* (1), thirteen years later, again the question came up and it was taken to the Exchequer Chamber on a similar series of deductions for frame rent, machine rent and winding, and also fines imposed for irregular attendance at the factory at the rate of 4½*d.* a quarter of a day for the time of absence. The Court below decided the case in favour of the employers on the authority of *Chawner* v. *Cummings* (2) and the Exchequer Chamber were equally divided, with the result that the judgment below was affirmed and *Chawner* v. *Cummings* (2) was applicable. The report says at the end: "Notice of appeal to the House of Lords has been given," but apparently if it was given it was not persisted in. It occurred to me at a very early stage of the case to inquire what the effect of an equal division of the Exchequer Chamber was in producing an authority binding on this Court, and although an answer was not made at the time, an answer has reached me in the course of the authorities I have referred to, and I find the question has been raised in the House of Lords and answered. In *Smith* v. *Lion Brewery Co.* (3) upon a question on the Income Tax Acts

(1) 2 B. & S. 61, 105. (2) 8 Q. B. 311.
(3) [1911] A. C. 150.

about the taxation of public houses and deductions which could be made before the income tax was paid, the House was equally divided, Lord Halsbury and Lord Atkinson being on one side and Lord Loreburn and Lord Shaw dissenting. The House being equally divided, the decision of the Court of Appeal was affirmed. In *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1), again under the Income Tax Acts, there came up a question of the taxation of public houses. Lord Loreburn was a member of the Court. There was cited to the House the decision in *Smith* v. *Lion Brewery Co.* (2), and Lord Loreburn says: "In my opinion this point was practically decided by the *Lion Brewery Co.'s* case. (2) I did not myself agree with that decision, and your Lordships' House was equally divided, but it is none the less binding, and our duty is loyally to carry it into effect." There were two members of the House, Lord Parker and Lord Sumner, who had not been parties to the decision. Lord Parker treats *Smith* v. *Lion Brewery Co.* (2) as binding the House to decide that particular ratio decidendi. Lord Sumner says (3): "In so far as any questions of law arise here—and it is not clear that there are any—I think that the decision in *Smith* v. *Lion Brewery Co.* (2) disposes of them." It appears to me that that leaves the decision in *Archer* v. *James* (4) as a decision of the Court of Exchequer binding on this Court, and I think perhaps support is obtained from the subsequent statute.

Mr. Eastham argued to us that deductions for bad work were illegal under the Act of 1831 and had always been illegal. I find that in the Employers and Workmen Act, 1875, s. 11 provides: "In the case of a child, young person, or woman . . . . any forfeiture on the ground of absence or leaving work shall not be deducted from or set-off against a claim for wages . . . . except to the amount of the damage (if any) which the employer may have sustained by reason of such absence or leaving work." So that in 1875 there is a statutory recognition of the practice of deducting from the

(1) [1915] A. C. 433, 444.
(2) [1911] A. C. 150.
(3) [1915] A. C. 433, 469.
(4) 2 B. & S. 61, 105.

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wages, but what seem to me stronger are the provisions of the Truck Act, 1896. Sect. 1 provides that an employer shall not make a contract with the workman for deductions for fines, which was a matter which had been allowed, except on limited terms. Sect. 2 provides that an employer shall not make a contract with any workman for a deduction for bad work unless certain conditions are complied with. I understand Mr. Eastham argues that these two clauses are really in favour of the employer, giving him liberty to do what he could not previously do under the Act of 1831. That argument appears to me to be completely destroyed by s. 8 of the Act, which provides that nothing in the Act shall make lawful any contract or payment which is illegal under the Truck Act, 1831. If the contracts in ss. 1 and 2 under the Truck Act were illegal, then ss. 1 and 2 had no effect whatever, and it appears to me obvious that the two sections recognize that it was legal at the time to make such contracts under the Truck Act, but provided for the protection of the workman by imposing certain conditions under which alone they could be made, with, under s. 9, power to the Secretary of State to exempt if he was satisfied that the provisions of the Act were unnecessary for the protection of the workman.

For these reasons, and on the finding in the case which seems to me to be a finding that the matter is one of contract, I think the contract contains a provision by which the amount of wages can be settled; but as Lord Denman C.J. said, it is immaterial whether that settlement is made at the beginning of the work or the end of the work when you know what the quality of work is which has been done, and that the price ultimately fixed is the wages or the weaving price for which the workman is employed, and that that so-called deduction is made before the wages are fixed, and is not made as a deduction from wages which have been already fixed. For those reasons, which are substantially the same, although expressed in my own words, as the reasons put forward in the Court below, it appears to me that this appeal should be dismissed.

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SARGANT L.J. I am of the same opinion. The ground has been so completely covered by the two judgments of Avory and Salter JJ. in the Court below and by the two judgments to which I have just listened that I do not think I should add anything useful to the subject by expressing my own view independently, inasmuch as it would be really a repetition of what has been already decided.

The decisive factor to my mind is the Truck Act, 1896, which appears to me to be directed to prohibiting or regulating something which might have been done previously, and not to be directed to enabling something to be done which could not previously have been done at all.

Appeal dismissed.

Solicitors for appellant: *Patersons, Snow & Co., for Fielding & Fernihough, Bolton.*

Solicitors for respondents: *Rawle, Johnstone & Co., for John Taylor & Co., Manchester and Blackburn.*

R. M.

[IN THE COURT OF APPEAL.]

C. A. 1927 *April* 11.

GOWAR *v.* HALES.

Practice—Third Party—Action for Damages against Motorist—Motorist insured—Insurance Company sought to be made a Third Party—Rule against disclosing Fact of Insurance to Jury—Rules of Supreme Court, Order XVI., *rr.* 48, 52.

As a general rule, in the absence of special circumstances, the insurance company which has issued a motorist's insurance policy should not be brought in as a third party at the hearing of an action for damages by the injured party against the motorist.

It is a well established rule of practice at the Bar, enforced by the judges, that in an action against a motorist the jury should not be informed that the defendant is insured.

Lothian v. *Epworth Press*, reported post, p. 199n., distinguished.

Observations on the changing temper of juries per Scrutton L.J.

APPEAL from an order of Shearman J. in chambers.

The plaintiff's claim in this action was for damages alleged

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to have been sustained through the negligence of the defendant in driving a motor cycle combination on October 8, 1926.

By a policy of insurance dated June 6, 1926, and effected with the Anglo-Saxon Insurance Association, Ld., the defendant was insured against all sums which he might become legally liable to pay as compensation in respect of accidental bodily injury to any person and against accidental damage to property where such injury or damage was caused through or in connection with the motor cycle combination.

Conditions were endorsed on the policy, of which condition 2 provided that notice of any accident loss or damage should be given to the head office of the insurance company immediately after the occurrence, and condition 9 provided that if any dispute should arise between the company and the insured either as to the liability of the company or as to the amount of any claim, such dispute should be referred to arbitration in accordance with the statutory provisions at the time being in force.

The defendant in the action applied to bring in the insurance company as third party. The company objected on the grounds that the defendant had not complied with condition 2 relating to notice, and that by condition 9 the dispute should be settled by arbitration and not otherwise. The Master made no order upon the defendant's application except that the costs of the third party proceedings be the costs of the third party in any event.

The defendant appealed from the Master's order, and Shearman J. made the third party order and gave directions that the third party be at liberty to appear at the trial of the action and take such part as the judge should direct, and be bound by the result of the trial; and that the question of the liability of the third party to indemnify the defendant be tried at the trial of the action but subsequent thereto.

From that order the third party appealed. The appeal was heard on April 11, 1927.

Melville K.C. and *R. O. Mobbs* for the appellant. This is a running down case, and we contend that proper notice

was not given to us, and therefore we are not liable. The foundation of the procedure is Order XVI., rr. 48 and 52.

The question of the third party under a policy of insurance was discussed in *Lothian* v. *Epworth Press* (1), before the Court of Appeal, on which the respondent may rely, but which was an entirely different case from this.

It is improper for counsel to tell the jury that the claim is covered by insurance: *Askew* v. *Grimmer* (2); and it would justify the judge in discharging the jury and making the plaintiff pay the costs: *Wright* v. *Hearson.* (3) In a recent unreported case before him, the Lord Chief Justice, on a letter being read which referred to the fact of insurance, discharged the jury and continued the hearing without them. Further, the question had first of all to be referred to arbitration. The question between the third party and the defendant is not the same as between the plaintiff and the defendant.

Cyril Atkinson K.C. and *Single* (*H. Salter Nichols* with them) for the respondent company. This is a clear contract of indemnity to which Order XVI., rr. 48 and 52, apply, and the order was rightly made by the judge. The assured cannot claim until he has to pay, and unless the insurance company is joined in the action, the defendant is put to the necessity of two actions. According to the contract no settlement of the action could be made without the company's consent, and it takes the view that liability should be minimized. The jurisdiction of the Court is not ousted by the existence of the arbitration clause in the policy, and the insurers have made no effort or motion to have the question determined by arbitration. There is no necessity, because there is a third party notice, that the jury should know anything about it. The respondents come within every word of what was said in *Lothian* v. *Epworth Press.* (1)

LORD HANWORTH M.R. This appeal must be allowed and the order of the Master restored. [His Lordship stated

(1) Post, p. 199n. (2) (1927) 43 Times L. R. 354.
(3) [1916] W. N. 216.

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the facts and continued :] The action having started, an application was made by the defendant to bring in the insurance company as third parties. The Master refused the application, following what I conceive to be the general practice. An appeal was made to Shearman J. and he, on the ground, as I gather, that the amount was a very small one and the whole matter of no great importance, made an order and gave directions under Order XVI., r. 52, under which the third party was to attend the trial and take such part as should be directed, and that the matter at issue between the defendant and the third party should be decided immediately after the trial had taken place between the plaintiff and the defendant.

As I have said, I think that order was wrong and that the order of the Master should be restored. I desire to adhere closely to what I conceive to be the general practice in third party procedure. It must be remembered that Order XVI., r. 48, which provides for bringing in third parties, is a very limited rule ; it is more limited than it was originally, and it was found in the earlier practice that it was inconvenient to allow a standing right to a remedy-over to be tried by the third party procedure. The words " or other remedy or relief " have been struck out, and thus the third party procedure is intended, as the rules stand at present, to be limited in its sphere and scope, and there has grown up a practice which, I believe, is correctly stated in the case to which our attention has been drawn, in which Branson J. said that the inconvenience of letting the jury know at the trial that the defendant was insured was recognized, because it was of importance that the real issue between the parties, the plaintiff and the defendant, should be decided upon the merits of that issue without a supervening and prejudicial circumstance not really material being introduced—namely, that the defendant might have recourse under a policy against a large and in many cases a wealthy corporation. I think that it is important to recognize that rule and I think that the cases have established that third party procedure, which brings the insurance company,

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on whom the defendant is entitled to rely, plainly before the Court, is objectionable, and there are a number of cases which show that as a rule such an order is not made.

More than that, in the present case there are two important questions which arise as between the defendant and the third party. The third party says that there is no liability on its part because two conditions of the policy have not been complied with—namely, that relating to notice under condition 2, and further, that it is wrong altogether to bring the third party into Court, for the provision is definitely made in condition 9 that if there is a question in dispute between the defendant and the third party, that dispute shall be settled by arbitration and not otherwise. It appears to me that the course taken in making this order in the third party procedure is not appropriate where there are these two questions to be decided before the third party's liability can be established.

Lothian v. *Epworth Press* (1) has been called to our attention. In my opinion that case is not a guiding authority to us in the present. There it was uncertain whether the defendant or the third party was liable, and it was held convenient to avoid the possibility of an injustice arising by reason of the one or the other party excusing himself from liability at a time when it was impossible immediately to fix the liability, that they should both appear; but for that reason it does not seem to be an appropriate decision governing the present.

I am, therefore, of opinion that the order of Shearman J. should be reversed and the order of the Master restored. I might add that we have been glad that this matter has been fought as one of principle, the sums involved being apparently very small; and I might, perhaps, further add that under these circumstances I have some hope, which the fact of the insistence on the appeal has not destroyed, that this case ultimately may not involve actual litigation in order to ascertain the strict rights of the parties.

(1) Post, p. 199n.

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SCRUTTON L.J. I am of the same opinion. As the case raises, in my view, general questions of principle, I will express my reasons in my own words.

The owner of a motor vehicle has caused some damage to another party. The owner is insured. The person alleging himself to be damaged is suing the owner of the motor vehicle, who thereupon has taken out a third party procedure against his insurer and has asked for directions that the third party may appear at the trial of the action and take such part as the judge shall direct and be bound by the result of the trial. The Master, following what I conceive to be the ordinary and general practice, has declined to make a third party order. On appeal to the learned judge in chambers the learned judge has reversed the Master and has made a third party order. Of course, under those circumstances, a delicate question arises whose discretion is to be interfered with, whether it is the Master's discretion or the judge's discretion which ought not to be interfered with. But as, in my view, the case raises two questions of principle, I conceive that I am at liberty to interfere with the judge's order without infringing on the question of discretion.

The first question of principle is whether this third party claim should be dealt with at the same time as the hearing of the main action. The ways of juries with underwriters have undergone some change in the course of my experience. When first I was called to the Bar it was very difficult for an insurance company to get a verdict in their favour from a jury. Better counsel prevailed and the time came with a more extended insurance practice when one could rely fairly confidently on a fair hearing from a jury, although there was a slight prejudice against an insurance company which took the premium and did not pay. Then came the introduction of the motor policy with third party claims, direct claims for amounts claimed by third parties instead of claims for damage to the subject-matter, and, for part of my experience, it was almost impossible in fact to get a jury to find in favour of motorists when there were very few motors. As time went on and as probably half the jurors

owned motors themselves, the view of juries changed and they might be relied on to decide fairly between plaintiff and defendant even although the defendant was a motorist; in fact it was very difficult, and I believe it still is very difficult, to get any criminal conviction against a motorist from a jury.

But if it was not a question of an action against a motorist but a question whether an insurance company should pay a person who was damaged by a motor, it was found extremely difficult to get fair hearings from juries, with the result that it has been established as a rule of practice at the Bar which the judges enforce, that in an action against a motorist, the jury ought not to be told that the defendant is insured. Whether the way of enforcing it is, as has been done in one case cited to us, to discharge the jury when the fact has been told them, or whether it is, as in the case before Branson J., to say it is an error of judgment on the part of the counsel who has mentioned it but that the judge should endeavour to put it right by his summing-up, it is not necessary to decide here. There was this undoubted rule of practice on which the judges acted; and to have a rule of practice that a jury should not be informed that the defendant is insured, and for the judge at the same time to bring in the insurance company to take part in the trial of the action as the judge shall direct and be bound by the result of the trial, seems to me to be entirely inconsistent. In third party claims it appears to me that as a general rule, in the absence of special circumstances, the order for third party directions bringing in the insurance company should not be made for the reasons I have stated.

There were special circumstances in *Lothian* v. *Epworth Press* (1), to which we have been referred. That case was complicated by two things. In the first place there had been an application to stay on the ground of an arbitration clause in the policy, refused and not appealed against, and the Court of Appeal, therefore, did not take into account the existence of the arbitration clause in the policy; and, in the second

(1) Post, p. 199n.

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place, as all the judges who gave judgment say, there was a very peculiar and unusual feature in the case. It was quite doubtful whose servant the person was who drove the motor doing the damage, whether he was the servant of the Wesleyan Conference, or the servant of an institution called the Epworth Press which had some connection with the Wesleyan Conference, or the servant of a man who was book steward of the Epworth Press to the Wesleyan Conference, and oddly enough, the same question arose on the policy, because it was not at all clear whom the underwriters had insured and for whose negligence they were liable. On those grounds the Court of Appeal in that case thought there were special circumstances which justified the making of a third party order; but I can find no such special circumstances in this case, which appears to me the ordinary type of action against a motorist who is insured: therefore, on that first question of principle, that as a general rule in the absence of special circumstances third party claims upon an insurance policy should not be brought on at the hearing by third party procedure before the jury that is hearing the claim against the motorist, I should allow the appeal.

The second question of principle is this. There is an arbitration clause in the policy; it is not the ordinary *Scott* v. *Avery* (1) form, because it does not wind up as the ordinary *Scott* v. *Avery* (1) form does—with words to the effect that "the obtaining of an award shall be a condition precedent to the recovery of anything against the insurance company"—but Mr. Melville states that as policy is subject to conditions, and one is that disputes shall be settled by arbitration, the result is to the same effect as in *Scott* v. *Avery*. (1) I am not expressing any opinion about that contention. But there is an arbitration clause in the policy which means that the assured has agreed to the term of the policy that disputes between him and the insurance company shall be settled by arbitration. Now that does not oust the jurisdiction of the Courts if they think fit to allow an action; but it is a general principle that people who make contracts should

(1) (1853) 8 Ex. 487.

keep them rather than break them, and the owner of a motor car who, having agreed in a policy to settle a dispute by arbitration, does not do it but goes to law, is breaking his contract; and the general principle therefore on which the Courts act is that, unless there are special circumstances, they invite the person who brings an action to comply with his contract and go to arbitration. I do not see any special circumstances in this case which should cause the Court of Appeal to depart from that general rule: and on those two grounds of principle, therefore, the one that third party claims by motorists against insurance companies should not as a general rule be tried at the same time as the action fixing liability on the motorist, and, secondly, that the person who has entered into a contract containing an arbitration clause should as a general rule be made to keep his contract, I think the learned judge came to a wrong decision on the question of principle and that this appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *A. E. Hewitt & Crane.*
Solicitors for respondent: *Corsellis & Berney.*

NOTE.

COURT OF APPEAL. MARCH 7, 1926.

LOTHIAN *v.* EPWORTH PRESS.

The facts sufficiently appear from the following judgments of the Court (Bankes, Scrutton and Atkin L.JJ.) which are copied from the transcript of the shorthand note.

Cyril Atkinson K.C. and *H. D. Samuels* for the appellant.
Doughty K.C. and *A. W. B. Welford* for the respondent.

BANKES L.J. This is an appeal from a decision of the judge and the master, and it is certainly a very peculiar case from many points of view. The action was brought by a widow to recover damages for personal injury sustained by her and also for damages under Lord Campbell's Act in respect to the death of her husband. The action was brought against the Epworth Press. We do not know exactly what are the circumstances under which the Epworth Press is carried on, but it appears to be something in the nature of an institution under the will of John Wesley, under which he set up something in the nature of a library for the benefit of the Wesleyan denomination;

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and under a term of his will there were to be trustees, and apparently the trustees appointed the Reverend John Alfred Sharpe, who is a gentleman who occupies a very prominent position in that denomination, as what they call the book steward. The action being brought against the Epworth Press sued as a firm, if the action was to be defended at all, some one had to enter an appearance, and the person who entered an appearance was Mr. Sharpe, who describes himself as trading as the Epworth Press, and the plaintiff was quite satisfied with that. There was no suggestion on her part that a person, who had no business to enter an appearance in this action, had entered an appearance. So far as she was concerned she was quite content with the appearance, and content that the action should proceed in that form. The Reverend J. A. Sharpe had taken out a policy of insurance covering, amongst other things, third party risks in respect of a motor car, and he had taken out that insurance with the defendants. The insured person in that policy is described as John Alfred Sharpe, address 25 City Road, London, occupation, book steward to the Epworth Press, and then on his behalf a very unusual procedure was adopted, because on his behalf third party proceedings were instituted against the insurance company, the General Accident Assurance Corporation, which under ordinary circumstances one would say is the last thing that a defendant sued for damages in an accident would desire to do, because it at once discloses to the jury the fact that the defendant is insured in respect of the accident or the negligence which caused the death. However, the defendant in this case adopted that course, and appearance was entered by the third party, and an application was then made to stay the proceedings on the third party notice upon the ground that there was a clause in the policy referring any dispute to arbitration; and Swift J. in the exercise of his discretion apparently refused to stay the proceedings and they went on. Then the next step was that when application was made upon the order for directions by the defendants, the insurance company, the third parties, took the objection, as I understand the decision of the master and the judge so far as we have been referred to them, that the person sued and the person insured were not one and the same person and therefore there was no ground whatever for the third party proceedings, and that objection seems to have prevailed. Now Mr. Doughty had said that we ought not to interfere with the discretion of the learned judge and the master in such a matter, and I agree there is a great deal to be said for that contention. I agree also, I think, that there are considerable difficulties and considerable inconvenience in proceeding in the way in which the defendant has elected to proceed, but I think they are difficulties and inconvenience which he will feel more acutely than the other party to the action. I do not think that this is a case in which the learned judge or the master did exercise their discretion in the sense that they decided that this was a case in which it was not convenient to have third party procedure. They decided on the ground that a point of law, as I understand, or something in the nature of a point of law, was taken before them, that the defendant in the action was one person and the person insured was another person. I do not think that that is manifest upon the face of the proceedings at all.

Then the next point is, is this a case within the rule in which there is a contract of indemnity? In my opinion there clearly is here a contract of indemnity, and a contract of indemnity against all sums which the insured,

whoever the insured is, shall become legally liable to pay. I do not think that the authorities to which we have been referred, which have reference to policies of marine insurance, policies in relation to salvage and so forth, have any relation to this case at all where the contract of indemnity is so plain as it is in this case. That being so, it seems to me that the defendant brings the case within the rule, and although I can see from the point of view of the defendant that he brings himself into a position in which I can see there may be great difficulties, I cannot say that the third party procedure is not the best way of deciding the various difficulties which do arise; because one of the questions raised by the insurance company is not only whether the plaintiff is entitled to succeed in the action against the defendant, but whether the defendant is the person insured. Then there is the question which the insurance company wish to raise, and which seems to me still open to them to raise by a matter of pleading, that the particular question which the defendant desires to have decided must, under the contract between them, be decided by arbitration. All those matters will have to be dealt with upon a proper order for directions made by the master upon the summons for directions. I cannot help thinking myself that it would be better for all parties if the insurance company would admit that if anybody was liable to the plaintiff it was Mr. Sharpe, and that then all questions between the insurance company and Mr. Sharpe should be dealt with by arbitration; but that, of course, can only be done by consent, and in the absence of any consent I think the somewhat difficult questions which are raised as between the third party and the defendant ought to be settled at the same time, or immediately after the questions between the plaintiff and the defendant, and that certainly the insurance company ought to be bound by the result of the decision as between the plaintiff and the defendant on the question of law.

For these reasons I think that this appeal must be allowed, and the appellant will have the costs here and below in any event in the third party proceedings.

SCRUTTON L.J. I regard this as a difficult case and my mind has been in a state of great doubt throughout all the arguments and is still in a state of great doubt, but, for the reasons I shall give, I do not dissent from the decision which my brother has arrived at, although I am bound to say I anticipate a series of very considerable difficulties in the way of both parties in working it out.

The plaintiff, a lady, has brought an action because she has been damaged by a motor car, and she has brought an action against a defendant called the Epworth Press, and a gentleman named Sharpe has entered an appearance saying: "I am the Epworth Press," "I am trading under the name of the Epworth Press." Mr. Sharpe, a minister of the Wesleyan denomination, has then taken out a third party proceeding against the underwriters who have insured him. The insured is John Alfred Sharpe, occupation, book steward in the Epworth Press, against third party claims, that is to say, in the language of the policy, against all sums which Mr. Sharpe shall become legally liable to pay in respect of any claim by a person for damage caused by the car. I personally have never heard of an insurance company insuring a motor car being brought in as third party. I see such an order was made in a case where the matter was not discussed—a case in the Times

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Reports—and I think the reason is pretty obvious. The defendant who brings in the insurance company as third party is generally asking for trouble. The defendant who advertises to the jury "I am insured" is pretty certain to get a verdict against him. For these reasons, defendants, being usually sensible, do not usually rush in and ask for third party proceedings; still less do defendants generally rush in and ask for third party proceedings when there is a *Scott* v. *Avery* (1) difficulty hanging about the horizon; and consequently a defendant who is usually sensible does not generally ask for trouble. I never heard before of a defendant being rash enough to ask to bring in an insurance company in third party proceedings. However, this defendant is asking for trouble and my impression is he is going to get a good deal more than he bargains for, but that is his look out and not mine. I have to decide whether if he does ask for trouble he is on the wording of the rule entitled to get it subject to this, that, if it is a matter of discretion in the judge and the master below, this Court will not usually interfere with the discretion. Now the marine insurance cases which have refused to bring in insurance companies as third parties, I think, have been based on the ground which I state in my judgment in *Clover Clayton & Co.* v. *Hessler & Co.* (2), that the insurance ordinarily in marine insurance cases, and those cases where third party procedure has not been allowed, was against loss which the assured may incur through loss of or damage to the subject of the insurance, and that was a different thing from indemnifying him against any claim by other persons against him. One case does occur to me in marine insurance, where there would be a clear case of insurance against third party claims, and that is the collision clause in policies of marine insurance. I am not sure that there has ever been a decision whether you can bring in, in a claim on a collision, the underwriter on the policy under the collision clause; but as a matter of fact, I know perfectly well, that it is almost invariable for the underwriter to undertake the defence under the collision clause. Therefore the question in practice hardly ever arises; but here is a clear policy insuring against claims, amounts which have to be paid under legal liability resulting from a claim, and if for some reason or another which I do not understand the defendant does think he ought to insist on third party procedure, it appears to me that it does come within the words of the rule. It is a claim for indemnity and an indemnity against claims, as distinct from a claim for indemnity against loss to the subject matter of insurance. That being so, prima facie as I say, for some reason which I do not understand, the defendant does want to ask for all the trouble he is going to get. In this case I think that strictly on the rule he is entitled to do it. That being so, I have some doubt as to whether or not we are interfering with the discretion below. As I understand the line on which the master and judge have proceeded, it is this: there is a disputed question whether the person against whom the claim is made is the person whom the underwriter insured; whether the Epworth Press, who are the persons against whom the claim is made, are the persons whom the underwriters have insured—namely, Sharpe. That question may arise both in the action by the plaintiff against the defendant on the point whether the person driving the car was the servant of Sharpe appearing as the Epworth Press, or whether he was the servant of the Wesleyan Conference for whose

(1) 8 Exch. 487. (2) [1925] 1 K. B. 18.

benefit the Epworth Press appears to be carried on; and it may also arise between the underwriter and the assured on the question whether the person who is insured is Sharpe, or whether it is the Epworth Press, whatever the relation of that body to the trustees of the Wesleyan Conference is. If that is the ground on which they have decided it, that is not so much discretion as a view of the legal possibilities. For that reason I think we may, if the matter comes within the rule, interfere with the order they have made without interfering with their discretion. If they have said this: "In view of the questions which are going to arise we do not think there is any advantage in proceeding from third party procedure, but on the contrary there may be a disadvantage," I do not think we could have interfered with the order they have made, but on the ground on which they have put it I think I may interfere. I only desire to say this, I think the trouble in this case is only beginning. We shall hear of this case again, I am quite sure, on the order for directions which is made and the order as to what part the third party is to take in the proceedings in the action and by what he is to be bound. But if the defendant will rush into this sort of thing, I am afraid he must put up with the consequences.

ATKIN L.J. I agree. It appears to me in the first place that this is a case under Order XVI., r. 48, where a defendant claims to be entitled to indemnity over against any person not a party to the action. Those words have been cut down by decisions to cases where the right to indemnity exists from express contract or from some statute. But it appears to me that this is an obvious case of an express contract of indemnity, because in terms the insurance company undertake to indemnify the assured against any legal liability which they may incur to third persons. Therefore, though there are not any recorded instances (indeed I only know of one recorded instance) of a case where the insurance company has been brought in under third party procedure in respect of a third party insurance, I have no doubt that the procedure is a perfectly apt procedure. On the other hand, I have very little doubt but that the reason that there is such a scarcity of precedent is that, in almost every case where there is an insurance company, the insurance company does in fact come in of its own accord and under the terms of the contract take over the defence, and therefore everything happens which would have happened if third party proceedings had been taken. Now is this a proper case or not for third party proceedings? The obvious object of the rule is to prevent matters which are in dispute being litigated twice over, once between the plaintiff and the defendant, and, secondly, the same question being independently treated as between the defendant and a third party. In this case the insurance company are raising one common question of great moment, because they say in fact: "You, the assured, who have entered an appearance are not liable to the plaintiff, because we say that the motor car was registered in the name of the Epworth Press; the servant, the driver of the motor car, was the servant of the Epworth Press, and you, our assured, Mr. Sharpe, are not the Epworth Press, and therefore you are not liable, and there is no liability against us." It appears to me it would be a most unfortunate circumstance that that should be fought as between the plaintiff and the defendant and that one decision should be arrived at, and then fought between the defendant and the third party and possibly a

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different decision arrived at. The object of third party proceedings, as I have stated, is to avoid such a happening as that, and I think it is most important that the matter should be determined. It is a question of fact, and it is a question of fact which appears to me very fit to be determined by a jury. Under those circumstances therefore it appears to me that the proper order to have made in this case was to make the order for directions, and I think therefore this case should be remitted to the master. The appeal should be allowed and the case remitted to the master to give the necessary directions on the application of the defendant. What the result will be, I do not know. I see the defendant is represented by advisors who are capable of giving him the best advice possible under the circumstances, and I have no doubt they have carefully considered the position in the defendant's own interests, and speaking for myself I am quite satisfied with that position so far as our decision is concerned. What will happen at the trial I do not know. At present it appears to me that this appeal should be allowed and, as I have said, the case remitted to the master to give directions on the order for directions, and I think the defendant ought to have the costs in the third party proceedings in any event.

Solicitors for the appellant: *Leonard Bingham & Sharp.*
Solicitor for the respondent: *F. J. Stewart.*

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Education—School—Mentally defective Child—Requirement to send to special School—Non-compliance—Liability of "parent"—Mother—Education Act, 1921 (11 & 12 *Geo.* 5, *c.* 51), *ss.* 42, 53, 54, 170, *sub-s.* 12.

Where a defective child over seven years of age is residing with and in the actual custody of her mother, and her father is serving a sentence of penal servitude in prison from which he will probably not be released for upwards of five months, the mother is the "parent" of the child within the meaning of the Education Act, 1921, Part V., relating to defective children, and consequently an order may properly be made against her under s. 54, sub-s. 1, of the Act requiring her to send the child to a certified school suitable for and willing to receive the child.

Hance v. *Burnett* (1880) 45 J. P. 54 applied.

Rex v. *Radcliffe. Ex parte Oxfordshire County Council* [1915] 3 K. B. 418 distinguished.

CASE stated by justices for the county of Somerset.

On October 11, 1926, a complaint was preferred before the justices by the deputy clerk of the county council for the county of Somerset on behalf of the local education authority of the county (hereinafter called "the respondent")

under the Education Act, 1921, s. 54, against Marion Ann Woodward (hereinafter called "the appellant") for that she, on October 4, 1926, at the parish of Burnham-on-Sea in the said county being the parent of a defective child named Marion Lilian Woodward over seven years of age, was on September 18, 1926, required by the local education authority to send the child to a special school provided by them at Bishop's Lydeard in the said county, being a school certified by the Board of Education as suitable for mentally defective girls, and that she had failed without reasonable excuse to do so; and that the authority applied for an order requiring the said child to be sent to a certified class or school suitable for the child and willing to receive her.

On October 18 and November 1, 1926, the complaint was heard by the justices, and at the hearing the following facts were admitted or proved: The appellant was the mother of the child, and the child was then of the age of twelve years, and was then and at all material times residing with and in the actual custody of her mother, who was stone deaf. The father of the child was Harry Edward Woodward, who at all material times was serving a sentence of penal servitude, and was imprisoned at Maidstone Prison. The consent in writing of the child's father or of the appellant to the child being sent to the special school had not been obtained. The child was in fact a defective child within the meaning of that word in Part V. of the Education Act, 1921, and the county education committee acting as the local education authority were satisfied, after consultation with the appellant, that she was not making suitable provision for the child's education, whereupon they required her to send the child to a certified class or school suitable for the child, to wit, the special school. The appellant failed without reasonable cause to send the child to that school.

On June 14, 1926, Dr. A. E. R. Weaver, senior assistant school medical officer under the said local education authority, being a duly qualified medical practitioner approved by the Board of Education, gave a certificate in writing of that date "that this child, not being merely dull or backward,

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and not being an idiot, an imbecile, or a moral imbecile, is feeble minded within the meaning of the Mental Deficiency Act, 1913, but is not incapable, by reason of mental defect, of receiving benefit from the instruction in a special school or class under s. 56 of the Education Act, 1921," which certificate the justices found was to the effect that the child was defective within the meaning of s. 55 of the last mentioned Act, and the justices were satisfied that the certificate was correct. There was no doubt expressed by the medical witnesses on either side, Dr. Weaver being one of the witnesses for the appellant, nor had the justices any doubt, that the child was defective.

The special school at Bishop's Lydeard was one provided by the local education authority and was duly certified as such by the Board of Education within the meaning of s. 54 of the said Act of 1921. The school was one suitable for the child, and the authorities at the school were willing to receive her, and the justices considered it expedient that the child should be sent to that school. The school was not within reach of the child's residence, and was a boarding school. The appellant never selected a suitable class or school. By letter dated September 21, 1926, to the local education authority in reply to a letter from them, and again before the justices, the appellant refused to consent to the child being sent to the special school.

It was proved to the satisfaction of the justices that the appellant withheld her consent to the child being sent to the said school unreasonably, and the justices were not satisfied that her consent was withheld with the bona fide intention of benefiting the child.

At the hearing the appellant stated on oath that she refused her consent to the child being sent to the school on the ground that she believed that the child would do better at home in charge of herself as her mother than at school, where she would be liable to be punished, and that the child was quite capable of doing housework, and that she believed that the child was by reason of defective intelligence incapable of benefiting by instruction in a special school

for defective girls, and that she was so advised by her medical adviser, A. H. Lowther, Esq., M.B., a registered medical practitioner at Burnham-on-Sea. He was also called as a witness on behalf of the appellant, and testified that he had examined the child on one occasion—namely, on October 28, 1926—and gave as his opinion that the child was feeble minded within the definition of the Act of 1913, but that in his opinion she was incapable of benefiting by instruction at the special school, and that as the child was of an emotional temperament her interests would best be served if she remained at home in her mother's care, as it would be more beneficial for her to associate with normal persons than with other defective children.

The appellant contended that pursuant to the Act of 1921 the justices had no power in law to make an order that the child should be sent to the school on the grounds following: That the parent of the child within s. 54 of the Act of 1921 was the father and not the mother of the child if the father were alive and could be found; that no consultation had ever taken place between the local education authority and the father of the child; that no request had ever been addressed by the authority to the father of the child that he should send her to the school; that there was no evidence that the father had failed without reasonable excuse to send the child to the school; that there was no evidence that the consent in writing of the father of the child had ever been requested, or obtained, or unreasonably withheld; that there was no evidence before the justices that the mother of the child in refusing her consent to the child being sent to the school was not acting with the bona fide intention of benefiting the child; that there was no evidence before the justices that the mother was acting unreasonably in withholding her consent; and that the medical certificate was incorrect.

The respondent contended that the child was in the actual custody of the appellant, and that she was the parent of the child; that on the facts admitted and proved the complaint was made out, and that the whole of the provisions of s. 54,

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including the proviso thereto, and of s. 55 of the Act of 1921, were satisfied; and that the justices had power in law to make the order asked for.

The justices were of opinion that the contentions of the respondent were correct, and, there appearing to them to be no reasonable excuse why the child should not be sent to a special school, they made an order that the child should within fourteen days be sent to the special school.

E. H. C. Wethered for the appellant. The order of the justices requiring the child to be sent to the special school was not a valid order under the Education Act, 1921, s. 54, or at all, and it should be set aside. First, the order was bad, inasmuch as it required the child to be sent to the special school by the appellant as the parent of the child. The appellant was not the parent of the child within s. 54 or the other provisions of the Act. Sect. 170, sub-s. 12, no doubt provides that "parent" includes guardian and every person who is liable to maintain or has the actual custody of the child. It does not however follow that the person having the actual custody is to be regarded as the parent in all circumstances. It is to be observed that throughout Part IV. of the Act of 1921 relating to school attendance and comprising ss. 42 to 50, and also throughout Part V. relating to defective children, except in s. 58, the expression used is "parent" in the singular, and it would thus seem that in reference to a case such as the present only one person can be the parent at a given time. It is submitted that the father of the child if he is alive and can be found is the parent of the child to the exclusion of every other person, even though that other person may be the mother of the child who has the actual custody of it. That view is borne out by the decided cases. In *Rex* v. *Radcliffe. Ex parte Oxfordshire County Council* (1) it was held that under the Mental Deficiency Act, 1913, the father of the defective if he could be found was the parent whose consent was required

(1) [1915] 3 K. B. 418.

to a petition for an order sending the defective to an institution. In *Hance* v. *Burnett* (1) it was no doubt held that under the Elementary Education Act, 1870, the mother of a child having the actual custody and control of it was liable as its parent for neglecting to cause the child to attend school, while her husband was at sea. That case, however, is distinguishable from the present case, because it was not there found that the husband was the father of the child. In giving judgment in that case Lord Coleridge C.J. certainly went on to say that if the child was the husband's child, he thought nevertheless that the mother was liable; but that observation cannot be regarded as more than an obiter dictum. In *London School Board* v. *Jackson* (2) it was held that a widow was liable as the "parent" of a child within the meaning of the Elementary Education Acts for non-compliance with an order to educate her child, notwithstanding that the child was residing with and under the control of a relative. Similarly, in the present case the father of the child is the parent, though the child is residing with and under the control of the mother.

Secondly, the order was wrong in requiring the child to be sent to the special school by the appellant as being a parent who had failed without reasonable excuse to send the child to the special school. There was no evidence to show that the appellant failed without reasonable excuse or unreasonably withheld her consent to the child being sent to the special school. On the contrary the justices ought to have been satisfied on the evidence that the respondent withheld her consent with the bona fide intention of benefiting the child.

Croom-Johnson K.C. for the respondent. The order requiring the child to be sent to the special school was properly made against the appellant. In the circumstances of the case it is the appellant and not her husband who is the "parent" of the child for the purposes of the Education Act, 1921. Part IV. of the Act relates to school attendance, and s. 42, which is the first section in that part of the Act, provides

(1) 45 J. P. 54. (2) (1881) 7 Q. B. D. 502.

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that it shall be the duty of the parent of the child to cause the child to receive efficient elementary instruction. Part V. relates to defective children, and s. 53 in that part of the Act provides that the duty of the parent under Part IV. shall in the case of a defective child include the duty to cause the child to attend a special school. The term "parent" has thus the same meaning in Part V. as in Part IV., and the duties under both parts are imposed upon the same person. Sect. 170, sub-s. 12, provides that in the Act the expression "parent" includes every person who is liable to maintain or has the actual custody of the child. The main object of the Act is to benefit the child, and in order to attain that object it so defines the term "parent" as to include the person who, at the time when the provisions of the Act are to be enforced, is in a position to enforce them. It appears from the judgment of Lord Coleridge C.J. in *Hance* v. *Burnett* (1) that, where the father of the child is out of reach and the mother has the actual custody of the child, she is the "parent" liable to the duty of causing the child to be sent to school, and therefore subject to the duty imposed upon the parent by Part IV. of the present Act of 1921. As the term "parent" has the same meaning in Part V. as in Part IV., it follows that in these circumstances, which are the circumstances of the present case, the mother is also subject to the duty imposed upon the parent by Part V. of the Act.

[He was stopped.]

LORD HEWART C.J. This is a case stated by justices for the county of Somerset. The case arises upon a complaint preferred by the present respondent on behalf of the local education authority of Somerset under s. 54 of the Education Act, 1921, against the present appellant. The complaint was that the appellant being the parent of a certain defective child over seven years of age was required by the said authority to send the child to a special school certified as suitable for mentally defective girls, and that the appellant had without reasonable excuse failed so to do, and that thereupon the

(1) 45 J. P. 54.

said authority applied for an order requiring the child to be sent to a certified class or school suitable for the child and willing to receive her. That complaint being heard by the justices, they made an order that the child should be sent to a named school within a named period. The appellant appeals from that order, and the question is whether the justices came to a correct determination in point of law.

The facts of the case may be stated quite shortly. [His Lordship summarized the facts and continued as follows :] Upon those materials two points have been urged on behalf of the appellant. The first point is that there was no evidence upon which the justices could reasonably arrive at the finding of fact that the appellant withheld her consent to the child being sent to the certified school unreasonably and not with the bona fide intention of benefiting the child. With regard to that submission it appears to me that the evidence upon the one side and upon the other, which is fairly and clearly summarized in the case, was before the justices, and that it is clear that the justices upon that competing evidence came to a conclusion as to which it is only necessary to say that it was a conclusion of fact to which they were entitled to come. What appears upon analysis to be meant by the submission that there was no evidence upon which the justices could reasonably come to this conclusion, is that they did not accept the evidence given by and on behalf of the appellant, but preferred the evidence which was given on behalf of the local education authority.

The second contention, which raises the real point of substance in this case, is that, notwithstanding that the father was at all material times serving a sentence of penal servitude in Maidstone Prison, he was nevertheless within the meaning of the Act the " parent " of the child ; that nothing had happened to impose upon him any disability in relation at any rate to this matter ; and that, as his consent had neither been asked nor received, the condition precedent had not been fulfilled, which required that before the local education authority made the order referred to here the consent of the parent must first be obtained or in the alternative

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unreasonably withheld. Is it true to say that within the meaning of the term in Part V. of the Act the father in such circumstances as those of the present case continues to be the "parent" whose consent, whether given or withheld, is the material consent? That question depends upon the terms of this Act and not upon the use of like terms in some other Acts. In this Act s. 42 at the beginning of Part IV. provides as follows: "It shall be the duty of the parent of every child between the ages of five and fourteen, or, if a byelaw under this Act so provides, between the ages of six and fourteen, to cause that child to receive efficient elementary instruction in reading, writing and arithmetic." When one turns to the definition section in the Act, which is s. 170, one finds that: "The expression 'parent' in relation to a child or young person includes guardian and every person who is liable to maintain or has the actual custody of the child or young person." It was not denied in the argument on behalf of the appellant that, at the time when the father was detained in prison and the child was in the actual custody of the mother, it was the mother who would have been liable if there had been neglect of the duty imposed on the parent by s. 42. Reference may usefully be made upon that point to the case of *Hance* v. *Burnett*. (1) It was there held that the mother of a child, having the actual custody and control of the child, was liable for neglecting to cause the child to attend school while her husband was at sea, whether or not he was the father of the child. In giving judgment Lord Coleridge C.J. said: "I observe that it is not found in the case that this was the child of the husband. If it had been his child, I think nevertheless that owing to the father's absence, as the child was in the actual custody of the respondent, she was liable to see to the child being sent to school, otherwise the children of the seafaring population might be wholly neglected. The words of the statute sufficiently comprehend the present case, and the justices ought to have convicted." Those observations, as it seems to me, are apposite to the present case. When one turns to Part V. of the Act under which

(1) 45 J. P. 54, 55.

the proceedings now under examination were launched, the matter is, I think, still more plain. By s. 53 of the Act it is provided that: "The duty of a parent under Part IV. of this Act to cause his child to receive efficient elementary instruction shall, in the case of a defective or epileptic child over seven years of age in any place where a special class or school certified by the Board of Education for defective or epileptic children, as the case requires, is within reach of the child's residence, include the duty to cause the child to attend such a class or school, and a parent shall not be excused from this duty by reason only that a guide or conveyance for the child is necessary." It might indeed be said that the admission, that in the circumstances of this case the mother would have been the person liable in the case of a normal child for omitting to perform the duty laid upon the parent by s. 42, carries with it the proposition that in these circumstances she is the person liable as the parent in the case of a defective child for failing to perform the duty imposed upon the parent by s. 53. Sect. 54 provides as follows: "(1.) If a local education authority for elementary education are satisfied, after consultation with the parent of a defective or epileptic child over seven years of age, that the parent is not making suitable provision for the child's education, they may require the parent of the child to send the child to a certified class or school suitable for the child, and, if he fails without reasonable excuse to do so, may by complaint apply to a court of summary jurisdiction for an order requiring the child to be sent to a certified class or school suitable for the child and willing to receive him. . . . ." To apply that section to the circumstances of a case such as the present, if the father of the child, by reason merely of the fact that he remains the father, is to be regarded as the "parent" referred to in the section, notwithstanding that he is in prison serving a sentence of penal servitude, the consequences become a little grotesque. The local education authority must then satisfy themselves after consultation with the person undergoing penal servitude that he, being in that place and in those circumstances, is not making

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suitable provision for the child's education. The local education authority must then require the convict undergoing penal servitude to send the child to a certified class or school suitable for the child; and it is only if the convict fails without reasonable excuse to do so that they may by complaint apply to a court of summary jurisdiction for an order against him. If the father was the "parent" referred to, what more reasonable excuse could he offer than to express his regret that he was not in a place where it was possible for him to comply with the requirement? The result would thus be that as he had a reasonable excuse for not sending the defective child to the special school, the child would be neglected until the period of penal servitude, whatever it might happen to be, came to an end, because only on its expiration would he be deprived of the reasonable excuse.

There are other sections of the Act which seem to me to enforce the same conclusion. I think that the test to apply in order to ascertain whether a person comes within the meaning of the word "parent," is to ask whether he is a person who, while otherwise satisfying the definition in s. 170, "is liable to maintain or has the actual custody of the child or young person." That is not to say that in other circumstances and under the provisions of other statutes the father in such circumstances may not retain the rights of a paternal parent. Reference has been made to the case of *Rex* v. *Radcliffe. Ex parte Oxfordshire County Council* (1), and, in particular, to the passage in the judgment of the Court with regard to obtaining the consent of the husband, if alive, to the making of an order under the Mental Deficiency Act, 1913. It is to be observed, however, among other things, with reference to that case that the matter there in question was the presentation of a petition—an affirmative act by the parent or guardian—and the statute had provided for the protection of the parent or guardian. Where the petition was not presented by the parent or guardian the order was not to be made without the consent in writing of the parent or guardian, unless it was proved to the satisfaction of the

(1) [1915] 3 K. B. 418.

judicial authority that such consent was unreasonably withheld or that the parent or guardian could not be found. It seems to me that the reasonings in that case upon the terms of that Act are not applicable to the special provisions of this Act with reference to the education of a defective child.

In these circumstances, it appears to me that the justices were entitled to come to the conclusion of fact to which they came, and that in the interpretation which they put upon the law they were right. I think, therefore, that this appeal ought to be dismissed.

AVORY J. I am of the same opinion. I think that in order to give practical effect to the Education Act, 1921, it is necessary that we should hold that the expression "the parent" in s. 54 of the Act means the parent who de facto has the custody or control of the child and not the parent who de jure has the custody or control of the child. It would otherwise be impossible, as my Lord has pointed out, to give any effect to s. 54 in such a case as this, because, where the father is in penal servitude, it would always be said by him that he had a reasonable excuse for not complying with the requirement that was made upon him. From sub-s. 3 of that section in particular it is obvious that the section contemplates a parent who has the custody or control of the child in fact, and not one who has it merely in law, because that sub-section provides: "Nothing in this section shall be construed as affecting the power of a parent to withdraw a child from school on proof to the satisfaction of the local education authority that he will make suitable provision for the child's education in some other way." In those circumstances it appears to me that we ought to follow the decision of the Court in the case of *Hance* v. *Burnett* (1), where the father was at sea, and not the decision in the case of *Rex* v. *Radcliffe. Ex parte Oxfordshire County Council* (2), where the father was at home and had de facto the custody and control of the child.

As to the finding of fact, which has been questioned, no doubt it would have been open to the justices to come to

(1) 45 J. P. 54. (2) [1915] 3 K. B. 418.

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a contrary conclusion as to the mother's reasons for not consenting to the child being sent to a special school, but since they have arrived at the finding in question as a finding of fact, it is impossible for this Court to interfere with their finding of fact.

I therefore agree that this appeal should be dismissed.

SHEARMAN J. I am of the same opinion. We are asked in this case to construe s. 54 of the Education Act, 1921, with regard to an alleged defective child. In my judgment the word " parent " in this section in its application to the father and mother means the parent who has the actual custody of the child. Those words occur in the definition section, which includes every person who has the actual custody of the child, and they mean the actual custody of the child at the time when the cause of the complaint arises. The difficulty I felt during the argument of the case was due to the considered decision in *Rex* v. *Radcliffe. Ex parte Oxfordshire County Council.* (1) That was a case arising out of s. 6 of the Mental Deficiency Act, 1913, and one is most desirous, if it can be avoided, not to give different meanings to the same words in cognate sections. On consideration I have come to the conclusion that the decision in that case does not in the least conflict with the decision which we are now giving. Where both husband and wife are living together the person having the actual custody would no doubt be the husband, and, as in the *Radcliffe* case (1) the wife and husband were living together, the Court very properly held that the husband was the person having the actual custody. The present case seems to me to be distinguishable from that case and to be in the line of the other authorities that have been cited, and on that line of authorities I think this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Calder Woods & Sandiford, for A. Chambers Harris, Burnham-on-Sea; Maude & Tunnicliffe, for G. I. Simey, Weston-super-Mare.*

(1) [1915] 3 K. B. 418.

J. R.

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BOWKER *v.* PREMIER DRUG COMPANY, LIMITED.

Adulteration—Sale to Prejudice of Purchaser—Certificate of Analyst—No statutory Standard of Quality—Sale of Food and Drugs Act, 1875 (38 *&* 39 *Vict. c.* 63), *ss.* 6, 21—*Criminal Law—Aiding and abetting —Wholesale Vendor.*

On a charge of selling to the prejudice of the purchaser an article of food not of the nature, substance, and quality demanded, under s. 6 of the Sale of Food and Drugs Act, 1875, there being no fixed standard of quality for the article, the justices must form a standard of their own based upon the evidence before them, and, in the absence of evidence to the contrary should accept the statements of fact in the analyst's certificate, including (per Shearman J.) his expressions of opinion therein.

On a charge of aiding and abetting such a sale, the wholesale firm who supplied the article to the above vendor for the purpose of sale cannot be convicted in the absence of evidence that, having supplied it for the purpose of being sold, they also knew that it was not what it purported to be, and that it was to be retailed to the purchaser without warning, and that they were present at the time of the sale, aiding and abetting.

CASES stated by the stipendiary magistrate of Salford.

The two cases herein reported arose out of the same transaction and were heard in succession by the same Court.

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An information was preferred by the appellant, Walter Stanley Bowker, under s. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), against Frederick James Woodroffe, the respondent, for that he on June 30, 1926, did sell to the appellant, and to his prejudice, a certain article of food, to wit, extract of meat and malt wine, which was not of the nature, substance and quality demanded. The appellant was an inspector under the Act of 1875, and on June 30, 1926, he purchased from the respondent a bottle of extract of meat and malt wine for the purpose of analysis. The bottle was labelled: "Extract of meat and malt wine. Guaranteed prepared from Liebig's Extract of Meat. This wine will be found invaluable as a stimulant to digestion. A

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tonic and a food. Non-alcoholic." The appellant paid 4*s.* 6*d.* for the bottle, and complied with the formalities required by s. 14 of the Act. The city analyst gave a certificate, the material parts of which were in the following form: "I am of opinion that the said sample contained the parts as under:—

Water	81.2 per cent.
Total sugars . . .	16.4 ,,
Other extractive matter .	2.4 ,,

"No change had taken place in the article that would interfere with the analysis. A genuine meat and malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts with a wine basis. The above 'other extractive matter' contains 0.06 per cent. phosphoric anhydride, indicating the possible presence of not more than 2 per cent. of a mixture of equal parts of meat and malt extracts. This opinion is based on the fact that a mixture of equal parts of meat and malt extracts contains about 3 per cent. phosphoric anhydride. The sample is therefore deficient of at least 60 per cent. of the minimum amount of meat and malt extract, and is entirely deficient of wine. This is not a meat and malt wine. Its composition is little different from that of an ordinary flavoured cordial." There was no fixed standard of quality for extract of meat and malt wine, but the amount of extract of meat and malt that had been put in the article supplied was very small—namely, 2.4 per cent. The value of the bottle of the extract for which 4*s.* 6*d.* was charged and paid, did not exceed 6*d.*, which included 3*d.* for the bottle. The respondent did not tender any evidence.

The appellant contended that the use of the term "wine" implied the presence of the fermented juice of the grape, and that in view of the certificate of the public analyst the sale in question was a sale of an article of food not of the nature, substance and quality demanded, and that the appellant was thereby prejudiced.

The respondent contended (*a*) that the article of food sold by him to the appellant was in accordance with the description

specified on the label affixed to the bottle containing the said article, and that the appellant was not thereby prejudiced; (*b*) that the article had no recognized standard of quality and the sale in this case was not an offence within the Sale of Food and Drugs Acts; and (*c*) that the term "wine" did not imply the presence of the fermented juice of the grape nor even that grape juice in any form was present.

The magistrate, whose attention was directed by the respondent to *Davidson* v. *M'Leod* (1); *Morton* v. *Green* (2); and *Smith* v. *Wisden* (3) was of opinion that the article of food purchased by the appellant was one for which there was no recognized standard of quality, and that he was bound by the decision in *Davidson* v. *M'Leod* (1) and on that ground dismissed the information, but stated this case.

Eastham K.C. and *E. L. Fleming* for the appellant. Sect. 21 of the Act of 1875 makes the certificate evidence of the facts therein stated unless the respondent requires the analyst to be called as a witness. This he did not do. The certificate was prima facie evidence and there was no evidence to contradict it, therefore the magistrate was wrong in dismissing the information: *Harrison* v. *Richards.* (4) There is no statutory standard as to what constitutes a meat and malt wine, but as there must be some standard it is generally that of the analyst, if not contradicted by evidence: *Robinson* v. *Newman.* (5) *Davidson* v. *M'Leod* (1) by which the magistrate considered himself bound was not binding on him, being a Scotch and not an English case, and moreover it did not deal with this point. *Roberts* v. *Leeming* (6) shows that in the absence of a standard justices must adopt their own standard, based on the evidence. The question in this case was one of fact—namely, was this an extract of meat and malt wine.

Wingate-Saul K.C. and *Macbeth* for the respondent. The magistrate was right. There was other evidence before him

(1) (1877) 5 R. (J.C.) 1; 42 J. P. 43.
(2) (1881) 8 R. (J. C.) 36.
(3) (1901) 66 J. P. 150.
(4) (1881) 45 J. P. 552.
(5) (1917) 81 J. P. 187.
(6) (1905) 69 J. P. 417.

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not set out in the case. In *Harrison* v. *Richards* (1); *Elder* v. *Dryden* (2); and *Robinson* v. *Newman* (3), the certificate was the only evidence given. The cases where it was held that the court must fix its own standard were often margarine cases, and the Courts so held only because of the definition of margarine in s. 3 of the Margarine Act, 1887 (50 & 51 Vict. c. 29). The certificate of the analyst is not evidence of a standard, but is a mere expression of opinion. All that the magistrate meant when he said he was bound by *Davidson* v. *M'Leod* (4) was that he did not think the article sold was so far beneath any possible standard as not to be the article demanded, which was the effect of the decision in that case.

[*Burton & Sons* v. *Mattinson* (5); *Wilson and M'Phee* v. *Wilson* (6); *Hoyle* v. *Hitchman* (7); *Hunt* v. *Richardson* (8); and *Smith* v. *Wisden* (9) were also referred to.]

LORD HEWART C.J. This is a case stated by the learned stipendiary magistrate for the city of Salford. The question arises in the following way: An information was preferred by the present appellant under s. 6 of the Sale of Food and Drugs Act, 1875, against the present respondent for selling to the appellant and to his prejudice a certain article of food, namely, extract of meat and malt wine, which was not of the nature, substance, and quality of the article demanded. The magistrate, having heard the information, dismissed it, and the question raised by this case is whether in so doing he came to a correct decision in point of law. It is not necessary to repeat all the findings of fact; it is enough to say that on June 30, 1926, the appellant, seeing in the window of the respondent's shop bottles of what was described as "extract of meat and malt wine," entered the shop and asked for a bottle of extract of meat and malt wine. It is found as a fact that that substance is a food. The label upon the

(1) (1881) 45 J. P. 552.
(2) (1908) 99 L. T. 20.
(3) (1917) 81 J. P. 187.
(4) (1877) 5 R. (J. C.) 1; 42 J. P. 43.
(5) (1902) 86 L. T. 770.
(6) (1903) 6 F. (J. C.) 10; 68 J. P. 175.
(7) (1879) 4 Q. B. D. 233, 238.
(8) [1916] 2 K. B. 446, 461, per Scrutton J. in a dissenting judgment.
(9) (1901) 66 J. P. 150.

bottle bore, amongst other things, the words, "Extract of meat and malt wine. Guaranteed prepared from Liebig's Extract of Meat. This wine will be found invaluable as a stimulant to digestion. A tonic and a food." The stuff in the bottle was analysed by the public analyst, and the certificate of analysis was offered in evidence. His conclusion was that the contents of the bottle were, water 81.2 per cent., total sugars 16.4 per cent., other extractive matter 2.4 per cent.; in other words, everything in this bottle was water and sugar except 2.4 per cent. The public analyst continued: "A genuine meat and malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts with a wine basis. The above 'other extractive matter' contains 0.06 per cent. phosphoric anhydride, indicating the possible presence of not more than 2 per cent. of a mixture of equal parts of meat and malt extracts. This opinion is based on the fact that a mixture of equal parts of meat and malt extracts contains about 3 per cent. phosphoric anhydride. The sample is therefore deficient of at least 60 per cent. of the minimum amount of meat and malt extract, and is entirely deficient of wine. This is not a meat and malt wine. Its composition is little different from that of an ordinary flavoured cordial." The case further finds that there is no fixed standard of quality for extract of meat and malt wine. It was a contention, and no doubt the main contention, of the respondent that the article purchased had no recognized standard of quality, and therefore the sale was not an offence. The learned magistrate having had an opportunity since December 16 last, when this case at the request of the respondent was remitted to him for further consideration, has re-stated it in exactly the same terms as those which he first employed.

The opinion to which the learned magistrate came is as follows: "I was of opinion that the article of food purchased by the appellant was one for which there is no recognized standard of quality, and that I was bound by the decision in *Davidson* v. *M'Leod*." (1) With regard to the decision

(1) 5 R. (J. C.) 1; 42 J. P. 43.

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in *Davidson* v. *M'Leod* (1) I think it is necessary to make only two observations. The first is that it has no real bearing upon this case, and the second is that, if it had, it would not be binding upon the magistrate sitting in Salford. Sect. 21 of the Sale of Food and Drugs Act, 1875, provides as follows: "At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness . . . ." What are the facts stated in this certificate? The statements with regard to the constituent elements of this compound are undoubtedly statements of facts. The statement of the relative proportions in which those elements are found is undoubtedly a statement of fact. Then the certificate contains a sentence which it is suggested is really a statement of opinion, or it may be an aspiration: "A genuine meat and malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts with a wine basis." Speaking for myself, I read that sentence as meaning that a genuine meat and malt wine does normally contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts with a wine basis. Starting from that conclusion, the certificate proceeds step by step to demonstrate that there was here a deficiency to the extent of at least 60 per cent. of the minimum amount of meat and malt extracts, and having set out the stages and the factors in the conclusion, it concludes with this final statement: "This is not a meat and malt wine." It is said that these are not statements of fact, but are expressions of opinion. The distinction between the two becomes a little metaphysical. In form they seem to me to be statements of fact, and if the respondent had wished to contend that these are not statements of fact but mere statements of opinion, the proper course was for him to require the attendance of the analyst so that he might be cross-examined, and it was open to the respondent to tender evidence per contra. This case, however, states in the clearest terms: "The respondent did not tender any evidence."

(1) 5 R. (J. C.) 1; 42 J. P. 43.

In those circumstances what was the true conclusion for the magistrate? I think that the matter is made quite clear by two cases. One is the case of *Harrison* v. *Richards* (1), where Lindley J., as he then was, said: "The magistrate in this case seems to have treated the certificate as matter of opinion and not of fact. He sets out his own opinion against the certificate, but I think that cannot be done, for the certificate is prima facie evidence, and it could not be thrown over merely by an opinion not founded on the evidence. No evidence was given to contradict the certificate." That was a certificate in which the constituent elements having been set out, the analyst said: "I am of opinion the same is a sample of milk adulterated with 20 per cent. of water." That case was in the year 1881. In the much more recent case of *Robinson* v. *Newman* (2) it was said by this Court (per Lord Reading C.J.): "The magistrates have to act upon the certificate of the analyst, which appears to be in the form in the schedule to the Act. The observation inserted in the certificate is justified by the note in the form in the schedule, and I do not think it is necessary to say more than that the analyst was entitled to express his opinion, and in the absence of a request that he should be called as a witness or of evidence to the contrary the justices should have acted upon it. The case of *Harrison* v. *Richards* (3) is in point, and the appeal must be allowed." Finally, I should like to refer to a passage in the case of *Roberts* v. *Leeming* (4), where Ridley J., who was one of the majority of the Court, said: "We have to consider the case of an article compounded for the purposes of commerce. It is not a natural product. You cannot say there is a certain standard which nature has laid down which is the proper standard for the qualities to be possessed by this particular article, and, as I think, the case is like the Scotch case, *Wilson and M'Phee* v. *Wilson* (5), quoted by Mr. Bartley, in which the court must lay down for itself a standard. In this case, therefore, the justices

(1) 45 J. P. 552, 553.
(2) 81 J. P. 187, 188.
(3) 45 J. P. 552.
(4) 69 J. P. 417, 419.
(5) 6 F. (J. C.) 10; 68 J. P. 175.

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had to make their own standard according to the evidence before them, and they had to say, Was this article in accordance with the standard?" And in like manner Lawrance J. said (1): "That the court can and must, unless the enactment is to be brought to nothing at all, fix some standard is, I should have thought, abundantly clear. There is nothing in the Act to show what margarine is. If it were not so, and if evidence of that kind were not admitted, it would be perfectly impossible to get at what margarine is under the Margarine Act at all"; and again: "But the decision in the case of *Wilson and M'Phee* v. *Wilson* (2) is absolutely clear, and I think that the court has power to, and must, dealing with an Act like the Margarine Act, fix some standard for itself."

Now undoubtedly the words "fix some standard" are ambiguous. I do not think that those learned judges meant that there must be a quantitative standard, drawing a hard and fast line. That is, of course, one way of fixing a standard, and in some cases it may be the best way, but there is clearly another way of doing so, and that is, to have regard to a minimum and to say with regard to the contents of a particular admixture that, upon any reasonable view of the true minimum, this compound must fall short of it. In the present case, the learned magistrate seems to have come to the conclusion that as there was no recognized standard of quality he was, so to say, functus officio, and anything could be sold under the name of "Extract of meat and malt wine." It has been suggested that there was some other evidence before him which caused him to doubt. It is upon no such matter that he has stated this case and restated it upon further consideration. The evidence as to the contents of this bottle, and as to the real meaning of "Extract of meat and malt wine," at least so far as the minimum required is concerned, is to be found in this certificate. Having set out that certificate, the learned magistrate says that "The respondent did not tender any evidence." That being the state of the evidence, I think it was the duty of the magistrate

(1) 69 J. P. 420. (2) 6 F. (J. C.) 10; 68 J. P. 175.

to say that this mixture fell below the standard, according to the only evidence worth regarding, of the true nature, substance and quality of extract of meat and malt wine, and therefore he ought to have convicted the respondent. In these circumstances and for these reasons, I think that this appeal ought to be allowed, and the case ought to go back to the magistrate with a direction to convict.

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AVORY J. I am of the same opinion. This certificate, upon its face, states as a fact that this article, which has been analysed, is not a meat and malt wine. In the absence of any evidence qualifying or contradicting that statement of fact, I think it was the duty of the learned magistrate to find that the article which had been sold had been sold to the prejudice of the purchaser, and I agree that the case should be remitted to him to do so.

SHEARMAN J. I am of the same opinion, and I desire to say a few words about the authorities. Sect. 21 of the Sale of Food and Drugs Act, 1875, provides that: "At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated." That is usually paraphrased by saying that the certificate of the analyst is conclusive unless contradicted. I think a very serious question arises as to what is the meaning of those words. It is a certificate of an expert analyst, and it is conclusive as to the facts therein stated. Extract of meat and malt wine is said to be a food, but it certainly is not a well known article of diet. In this particular case the analyst not only made an analysis, but he goes on in this form: "A genuine meat and malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts with a wine basis," and from that proposition he goes on to draw various inferences, and says that this does not comply with the standard. If it were not for the authorities, which, in my opinion, bind this Court, I should hesitate to say that those are facts which are stated in the analysis. To my mind it is an expression of opinion, that,

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having regard to this analysis, the analyst thinks the court ought to convict, and wants them to convict, and no more. There is no doubt also that the form of analysis in the schedule to the Act provides, in terms, that the analyst can express his opinion whether the mixture was for the purpose of rendering the article palatable or preservable, and state whether the excess is ordinary or not.

There are two authorities to which my Lord has referred; one is *Harrison* v. *Richards* (1), and the second is *Robinson* v. *Newman*. (2) The last case is ten years old, the other is many years old. Although in neither of those cases was more than one side represented, and that the side in whose favour judgment was given, it is quite clearly laid down in both those cases—I do not think it is possible to discriminate—that the analyst is entitled to express his opinion as to what the standard should be, and if that is uncontradicted, the magistrates are bound to accept it. The odd thing is that there are two reported cases: one *Reg.* v. *Field*. *Ex parte White* (3), and the other *Shortt* v. *Robinson* (4), where this Court decided the exact reverse. There the analyst had attempted to express a view and the magistrates declined to accept that view, and the Court declined to interfere with their finding. But in my opinion the two cases to which I first referred have for a long time been regarded as the leading cases. The later one, *Robinson's* case (2), is ten years old, and I do not think this Court ought to disturb the principle laid down by them. That principle is that the analyst is entitled to express his opinion as to what the standard of any article should be, in order that the thing sold should not be sold to the prejudice of the purchaser, and if he expresses his opinion in his analysis, the Court is bound to accept it unless it is contradicted. That, I think, is the present state of the law. That being so, I think that this appeal should be allowed.

Appeal allowed.

(1) 45 J. P. 552.
(2) 81 J. P. 187.
(3) (1895) 64 L. J. (M. C.) 158.
(4) (1899) 63 J. P. 295.

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The respondents, the Premier Drug Company, Ld., were the wholesale firm who on December 31, 1925, sold to Woodroffe, the respondent in *Bowker* v. *Woodroffe* (1), for the purpose of resale a dozen small bottles of meat and malt wine from which was taken the bottle sold to the respondent in the circumstances set out in the case stated. The respondents were charged with aiding and abetting the respondent Woodroffe in committing the offence therein described, but the magistrate, having dismissed the information against Woodroffe, the principal, consequently dismissed the information against the respondents.

Eastham K.C. and *E. L. Fleming* for the appellant. The magistrate, on the assumption that the Court holds that he ought to have convicted Woodroffe, was wrong in dismissing the information against the respondents for aiding and abetting him. It is not necessary to show mens rea; s. 6 of the Sale of Food and Drugs Act, 1875, created an unlawful act, and it is sufficient to prove the commission of the act: *Betts* v. *Armstead.* (2) Before inducing Woodroffe to sell this stuff, the respondents ought to have made inquiries about it: see per Bramwell B. in *Ex parte Smith.* (3)

Wingate-Saul K.C. and *Macbeth* for the respondents. It is agreed that it is not necessary to show mens rea in the person selling the article, but it must be shown that the person charged with aiding and abetting the sale had knowledge of the nature of the thing sold. There is no evidence that the respondents knew that Woodroffe was going to sell this extract without qualification; for all they knew, according to the evidence, he was going to sell it with the warning that it was not what it purported to be. It must be shown that they took some active steps—per Hawkins J. in *Reg.* v. *Coney* (4)—and it is not enough to show knowledge that the extract was going to be sold.

(1) Ante, p. 217.
(2) (1888) 20 Q. B. D. 771.
(3) (1858) 22 J. P. 450, 451.
(4) (1882) 8 Q. B. D. 534, 557.

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[AVORY J. The respondents were not present at the sale and therefore did not aid and abet.]

[*Du Cros* v. *Lambourne* (1) was also referred to.]

[He was stopped.]

Eastham K.C. replied.

LORD HEWART C.J. This is a case stated by the learned stipendiary magistrate for the city of Salford. It is closely connected with the case of *Bowker* v. *Woodroffe* (2), upon which we came to a conclusion earlier to-day. It is not necessary to repeat the details of this case.

The present respondents, the Premier Drug Company, Limited, were charged with aiding and abetting Woodroffe to commit the offence referred to in the previous case—namely, to sell to the appellant and to his prejudice a certain article of food, that is, extract of meat and malt wine, which was not of the nature, substance, and quality of the article demanded, contrary to s. 6 of the Sale of Food and Drugs Act, 1875. The learned magistrate came to the conclusion that the information ought to be dismissed. The question for us is whether he came to a correct determination and decision in point of law. One thing at any rate is perfectly obvious: if he did come to a correct decision it was not for the reasons that he gives. His reasons are as follow: "Having dismissed an information preferred by the appellant against the said Frederick James Woodroffe in respect of an alleged contravention by him of section 6 of the Sale of Food and Drugs Act, 1875 . . . . I was consequently of opinion that the facts did not disclose the offence charged in the information preferred by the appellant against the respondents." In other words, the learned magistrate says: "As I have dismissed the case against the principal offender I have no alternative but to dismiss the case against the alleged aiders and abettors." We have now found that he was wrong in dismissing the case against the principal offender, and have sent back that case to him with a direction to convict. It is perfectly obvious, therefore, that this case cannot be decided

(1) [1907] 1 K. B. 40, 45. (2) Ante, p. 217.

in favour of the respondents upon the ground upon which the learned magistrate dismissed the information. Yet it may appear that there are facts stated in the case which show that really the learned magistrate arrived at the right conclusion, and that the information ought to have been dismissed, although for quite different reasons. It is found as a fact, and is not denied, that this compound or mixture was sold by the respondents to Woodroffe. It is further found that these respondents induced Woodroffe to buy this stuff for resale. It is also found that at the time when the stuff was delivered to Woodroffe it was labelled, as it was labelled when it was sold, amongst other things, as extract of meat and malt wine and so forth. I have reluctantly come to the conclusion that these respondents could not be held liable, and that for more than one reason. First, they were charged as aiders and abettors, but they were not present at the time of the sale complained of; secondly, there is no evidence to show that they knew at any material time that this mixture was not what it purported to be, and what the label said it was; and thirdly, there is no evidence to show that they knew that although they sold this stuff labelled as extract of meat and malt wine Woodroffe was not going to sell it subject to the warning which he might conceive to be appropriate, as for example: "You ought to understand that this is really water," or "This is not wine at all," or "There is very little meat and malt extract in this, it is really a fraud."

In these circumstances I think that the learned magistrate was right in dismissing the case against these respondents, and I have reluctantly come to the conclusion that this appeal fails.

AVORY J. I agree that the learned magistrate was right in dismissing this summons against the respondents, not on the ground on which he did dismiss it, but upon the ground that there was no evidence that the respondents aided and abetted Woodroffe to commit the offence of selling to the prejudice of the appellant a certain article of food. Even

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if the summons had been amended, as Mr. Eastham rightly says it might have been amended at the hearing, into a charge that they did counsel and procure Frederick James Woodroffe to commit that offence, there still, in my opinion, would not have been any evidence to justify their conviction for that offence. Quite apart from the point that there was no evidence that they knew how this article was compounded, there was no evidence showing that they did not inform Woodroffe at the time when they sold it that it only contained 2 per cent. meat and malt extract, and that he must therefore warn purchasers before he sold it. Further, there was no evidence that they knew that in selling it on this particular occasion on June 30 he was selling it to the prejudice of the purchaser, that is to say, selling it without any warning or notice to the purchaser that it was not actually what it was represented to be by the label.

For those reasons I think it was impossible upon the evidence that was before the learned magistrate for him to have convicted either of aiding and abetting or of counselling and procuring the commission of this particular offence.

SHEARMAN J. I am of the same opinion. The magistrate dismissed this charge against the respondents of being aiders and abettors because he had already dismissed the charge against the principals. Naturally, he had nothing more to consider. This Court has decided that he was wrong in his previous decision. There is no reason to suppose, however, that if he had considered this question on its merits he would have arrived at a wrong decision. We are entitled to look at the stated facts, and if, according to the stated facts, he ought to have so decided we can dismiss the appeal. I know that moralists say that the person who provides the means to commit a crime is worse than, or just as bad as, the man who commits the crime, but that is not a sound maxim of criminal law. A crime must be a specific intentional act, and I know of no case saying that a man can be an aider and abettor if he knows nothing of the act or the date or the person against whom the criminal offence is committed.

It will not do to say: "You gave the means of doing it." A man is not an aider and abettor unless he was present actively or constructively assisting the act which is an illegal act. There is no evidence of that at all, and therefore the magistrate, if he had considered the matter, would have been quite right in dismissing the information.

Appeal dismissed.

Solicitors for the appellant: *Sharpe, Pritchard & Co., for L. C. Evans, Town Clerk of Salford.*

Solicitor for the respondents in both cases: *A. R. Lord, for Bernard Kuit & Co., Manchester.*

W. L. L. B.

HOLY LAW SOUTH BROUGHTON BURIAL BOARD *v.* FAILSWORTH URBAN DISTRICT COUNCIL.

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Local Government—Private Street Works—Expenses—Liability—Burial Ground "attached" to Place of religious Worship—Burial Ground Five Miles from Synagogue—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *s.* 16.

A burial ground vested in trustees upon trust to permit it to be used for the members of two synagogues in a city and others, but five miles distant from each of the synagogues, is not "attached" to the synagogues or either of them within the meaning of s. 16 of the Private Street Works Act, 1892, and consequently that section does not exempt the trustees from liability in respect of the burial ground for the expenses of private street works under the Act.

CASE stated by five justices for the county of Lancaster.

On November 17, 1926, the justices, sitting as a court of summary jurisdiction at Manchester, heard an application by the Failsworth Urban District Council (hereinafter called "the respondents"), under the Private Street Works Act, 1892, against the Holy Law South Broughton Burial Board (hereinafter called "the appellants"), for determining an objection made by the appellants to a proposal by the respondents with respect to the charge on the appellants, as owners of premises shown on the provisional apportionment

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as liable to be charged with 376*l.* 5*s.* 3*d.*, a part of the expense of executing certain private street works on part of road No. 2, extending from Cemetery Road to a point 53 lineal yards or thereabouts distant therefrom in a north-easterly direction within the said urban district.

At the hearing of the application the following facts were admitted or proved :—

The respondents were the urban authority under the said Act in the district of Failsworth, and the Act was in force in the said district.

On April 14, 1926, the respondents passed a resolution that specifications, plans, sections, estimates and provisional apportionments of the expenses of the private street works required to be executed in certain streets within the urban district of Failsworth should be approved, including part of road No. 2 ; and that the Jewish Burial Board, as owners of the premises known as the Jewish Cemetery abutting on road No. 2 within the district, were shown as liable to be charged in the provisional apportionment in respect of the works proposed.

By letter dated May 25, 1926, the appellants gave notice of objection to the proposals of the respondents, and claimed exemption under s. 16 of the Act on the ground that the cemetery or burial ground was attached to the synagogue of the Holy Law congregation and the South Broughton congregation, being places appropriated to public religious worship, and exempt from rates for the relief of the poor within the meaning of that section.

The synagogue of the Holy Law congregation was situate in Red Bank, Cheetham, in the city of Manchester, and the South Broughton synagogue was situate in Bury New Road, Strangeways, in the city of Manchester. Each of these synagogues was situate about five miles distant from the burial ground, and neither synagogue was within the district of the respondents. Both synagogues were places appropriated to public religious worship and exempt from rates for the relief of the poor. The burial ground was assessed for poor rates, and poor rate was paid in respect thereof to

the respondents. By an indenture made on October 25, 1922, between certain vendors and certain purchasers, some of these purchasers being members of the Holy Law congregation and the other members of the South Broughton congregation, certain plots of land and hereditaments were conveyed to the use of the purchasers as trustees upon trust to permit the same or such part or parts thereof as might from time to time be set apart and appropriated for that purpose to be used in perpetuity as a burial ground for the members of those congregations, or, if the trustees should so permit, for the members of other congregations, subject to such payments and conditions as the trustees might determine. A burial board was formed to carry out the terms of the indenture and named the Holy Law South Broughton Burial Board, and rules were made by that Board. The land of the appellants, which formed the premises of the Burial Board, and in respect of which the respondents desired to levy the charge, had at all material times been used by the respondents as a burial ground only and in accordance with the indenture and rules.

At the hearing of the application it was contended on behalf of the respondents that the burial ground was not attached to the synagogues or either of them within the meaning of s. 16 of the Act of 1892, in that the distance between the burial ground and the synagogues was five miles, and that the word "attached" in that section had a physical significance.

It was contended on behalf of the appellants that the burial ground was attached to both of the synagogues within the meaning of s. 16 of the Act of 1892; that the word "attached" in that section had not a physical significance; and that that word in that section had a purely functional significance.

The justices were of opinion that the burial ground was not attached to the synagogues or either of them within the meaning of s. 16 of the Act of 1892, and they accordingly determined that the objection of the appellants was bad and overruled that objection.

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Laski for the appellants. The order of the justices overruling the objection of the appellants to the charge upon them as owners of the burial ground of expenses under the Private Street Works Act, 1892, was wrong. Sect. 13, sub-s. 1, of the Act no doubt provides that any premises included in the final apportionment of the expenses shall stand charged with the sum finally apportioned, or if objection has been made against the final apportionment with the sum determined to be due; and s. 14 provides that the urban authority may recover the sum due summarily in a court of summary jurisdiction. Sect. 16, however, provides (inter alia) that the trustee of any place appropriated to public religious worship which is exempt from rates for the relief of the poor shall not be liable to any expenses of private street works as the owner of such place, or of any churchyard or burial ground attached thereto. Though there is no decided case or other authority which defines the meaning of the word "attached" in that section, it is submitted that the justices were wrong in holding that the burial ground in question was not attached to the two synagogues and to each of them within the meaning of the section. The word as used in the section has not a physical significance implying that the churchyard or burial ground must be materially connected with or adjoin the place appropriated to public religious worship. The word as there used has a functional significance implying that the churchyard or burial ground, whether materially adjoining or connected with the place of public religious worship or not, is used for the purposes of that place of worship or of its members. A churchyard belonging to a church and in which the church had a merely sentimental interest, though it was situated a hundred miles from the church, might be attached to the church within the contemplation of the section. Statutes which impose pecuniary burdens should be strictly construed, charges upon the subject being in the nature of penalties: Maxwell on the Interpretation of Statutes, 6th ed., p. 503. Thus where a person occupied the lower story of a building as a public house and the upper story as a dwelling-house,

the two stories having separate accesses, it was held that he was liable to inhabited house duty only in respect of the dwelling-house and not in respect of the public house: *Grant* v. *Langston*. (1) In the Oxford Dictionary the word "attached" when used in this sense is defined as meaning "joined functionally," and by way of illustration the following quotation is given: "A cemetery . . . . attached to the city."

W. Gorman for the respondents was not called upon to argue.

LORD HEWART C.J. This is a case stated by justices for the county of Lancaster. The question which it raises is whether in respect of a burial ground situate some five miles from two synagogues in Manchester there was exemption from liability under the Private Street Works Act, 1892, s. 16, by reason of the fact that the burial ground was in some sense connected or associated with each of those two synagogues.

It was contended on behalf of the respondents, the Urban District Council, that the word "attached," which is found in s. 16, has a physical significance. On behalf of the appellants it was contended that the word "attached" has no physical significance, but refers only to the purpose or function of the burial ground in relation to the place of worship. The words of the section are as follows: "The incumbent or minister or trustee of any church, chapel, or place appropriated to public religious worship, which is for the time being by law exempt from rates for the relief of the poor, shall not be liable to any expenses of private street works as the owner of such church, chapel, or place, or of any churchyard or burial ground attached thereto."

The topic which is being dealt with in the section is the expenses of private street works which, of course, must always be carried out in a particular street, and where there is liability for such works the proportionate part of the total expenses

(1) [1900] A. C. 383.

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which any particular person has to pay depends upon the extent of the frontage of the premises in which that person is interested in relation to the street works that have been or are about to be carried out. What is treated of throughout is not something abstract, theoretical or notional, but something physical and actual—namely, frontage, paving and streets. The section begins by postulating the existence of a physical structure or place where there is public religious worship. In order that the section may have any application at all one must first find a church, a chapel or a place appropriated to public religious worship. That physical structure having been identified, then, if that structure is exempt from rates for the relief of the poor, it follows that it is also exempt from the expenses of private street works, and the exemption is carried beyond the walls of the structure itself within which the religious worship takes place to land which is connected with it in a physical and also in a functional sense, if the word may be employed—namely, the churchyard or the burial ground. If a churchyard or burial ground is connected in that way with a church, chapel or place appropriated to public religious worship, and that church, chapel or place is exempt from rates for the relief of the poor, then the churchyard or burial ground is also exempt from rates, and in these circumstances the section does not impose liability for private street works upon the owner of the church, chapel or place by reason of the fact that either that structure or a churchyard or burial ground so connected with it has a frontage upon the street or streets where the works are being carried out.

In my opinion the whole scheme and framework of this section make it plain that what is being considered is physical connection or contiguity. It may well be that that is not enough, and that the churchyard or the burial ground in addition to having a physical connection and contiguity with the church, chapel or place appropriated to public religious worship which is exempt from rates must be the churchyard or burial ground of that particular church, chapel or place.

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I cannot, however, imagine that within the meaning of the term a churchyard or burial ground which is five miles away from a synagogue is "attached" to the synagogue merely because it is associated with the synagogue as a place where members of the synagogue and other persons may be buried. It is not necessary to discuss the question how close the actual physical contiguity must be, but I am satisfied that on any fair view of the meaning of this word "attached" there must be physical connection and association, and that it cannot be said that this burial ground, distant five miles from these two synagogues, is "attached" to the synagogues within the meaning of s. 16.

The justices were of opinion that the burial ground was not "attached" to the synagogues or either of them within the meaning of this section. The only question for this Court is whether in coming to that conclusion the justices came to a correct decision in point of law. Mr. Laski, if I may say so, has urged with ingenuity everything that can be urged on behalf of the appellants. But I am satisfied that these justices did not misdirect themselves, and that the contention of the respondents was right—namely, that the word "attached" in this section has a physical significance.

In these circumstances I think that this appeal ought to be dismissed.

AVORY J. I am of the same opinion. The appellants here are the Holy Law South Broughton Burial Board who, in fact, are in occupation of this burial ground, and who pay poor rates in respect thereof. The only question is whether this burial ground can be said, within the meaning of s. 16 of the Act of 1892, to be "attached" to the synagogue of the Holy Law congregation, or the synagogue of the South Broughton congregation situate at Manchester, so as to be exempt, as the synagogues themselves are, from liability for the expenses of private street works.

I am of opinion for the same reasons that have been given by my Lord that this burial ground cannot be said to be

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attached to either of those synagogues, and, therefore, that it is not exempt from liability for expenses under s. 16.

SHEARMAN J. I agree.

Solicitors for appellants: *O. Collier Littler & Kilbeg, Manchester.*

Solicitors for respondents: *H. Booth & Son, Oldham.*

J. R.

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July 5, 6, 26.

[IN THE COURT OF APPEAL.]

CONTINENTAL CONTRACTORS, LIMITED, AND OTHERS *v.* MEDWAY OIL AND STORAGE COMPANY, LIMITED.

[1924. C. 1869.]

Costs—Taxation—Claim dismissed—Counterclaim dismissed—Issues material to Claim and Counterclaim—Apportionment of Costs.

The plaintiffs brought an action against the defendants for wrongfully repudiating a contract to purchase oil from them over a period of a year and to provide storage for the oil during that time. They alleged in their statement of claim that the date named for the first delivery, February 15, 1924, had been postponed till March 15 by mutual agreement, but that on February 18 the defendants had refused to carry out the contract. The defendants pleaded as a defence that there had been no agreement to postpone delivery and that the plaintiffs had committed a fundamental breach of the contract in not making the first delivery by February 15 and in failing to give notice, as they had agreed to do, of the arrival of the oil; and they counterclaimed damages for these breaches. The plaintiffs in their reply and defence to the counterclaim denied that they had committed any breach of contract to deliver by February 15: (1.) because of the alleged agreement to postpone delivery, (2.) because the defendants were not ready and willing to provide storage for the oil, (3.) because the defendants had broken a condition precedent to the plaintiffs' obligation to deliver in that they had omitted to procure a banker's guarantee for the price of the oil to be delivered, and (4.) because the defendants had omitted to do this in order to prevent the plaintiffs from obtaining oil from their suppliers and so performing their contract with the defendants. At the trial the evidence and the arguments of counsel were mainly directed to these four matters.

Both the claim and the counterclaim were dismissed with costs. In taxing the costs the Taxing Master allowed the defendants only the

costs of litigating the first matter (the question whether there had been any agreement to postpone delivery), being of opinion that the three other matters arose on the counterclaim only. On a review of the taxation the judge held that the third and fourth matters arose only on the claim and defence, and that the defendants ought to have the whole of their costs of litigating these matters. With regard to the second question (the readiness of the defendants to provide storage), he held that this arose both upon the claim and upon the counterclaim; and, following *Wilson* v. *Walters* [1926] 1 K. B. 511, that the defendants were entitled to their costs incurred in litigating this question but that the plaintiffs were not entitled to any costs incurred by them in and about the matter because all these costs had been incurred in support of their claim, in which they had failed, and no extra costs had been incurred by them in defeating the counterclaim. On the plaintiffs' appeal to the Court of Appeal:—

Held, that all four matters arose upon the claim and upon the counterclaim and that the costs of all must be apportioned.

Christie v. *Platt* [1921] 2 K. B. 17 followed; *Wilson* v. *Walters* [1926] 1 K. B. 511, not followed; *Saner* v. *Bilton* (1879) 11 Ch. D. 416 and *Crean* v. *M'Millan* [1922] 2 I. R. 105 commented on.

APPEAL from an order of MacKinnon J. allowing objections by the defendants to a taxation of costs.

The plaintiffs were two limited companies concerned in the importation and sale of Russian paraffin oil. They were intimately connected in constitution, interests and objects and were treated and referred to throughout the proceedings indifferently as the plaintiffs. They were named Continental Contractors, Ld., and Ernest Beck & Co., Ld. They were incorporated and registered under the Companies Acts and had their registered offices at 3 and 4 London Wall Avenue in the City of London. The defendants were a limited company incorporated and registered under the same Acts. Their registered office was in Gracechurch Street.

The plaintiffs claimed 62,856*l.* 11*s.* 1*d.* for breach of contract by the defendants in wrongfully repudiating their obligations under two agreements in writing dated respectively November 28 and November 29, 1923, whereby the defendants agreed to purchase from the plaintiffs or one of them 50,000 tons of paraffin oil to be delivered over a period of twelve months. They alleged that by the terms of the earlier agreement the first delivery thereunder was to be made between January 15 and February 15, 1924, but that

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by a verbal agreement between the parties or their agents the date of the first delivery had been postponed until March 15, 1924, notwithstanding which the defendants had by a letter of March 18, 1924, definitely refused to perform the contract. The plaintiffs further complained of a breach by the defendants of the agreement of November 29, 1923, whereby the defendants undertook, for the purpose of fulfilling the agreement of November 28, to provide accommodation in tanks for 10,500 tons of oil for one year from January 15, 1924. The defendants by their defence denied that there had been any postponement of the date of the first delivery under the contract. They pleaded (para. 11) that by the agreement of November 28 the first delivery was to be of not less than 7000 tons within the period between January 15 and February 15, 1924, and that the plaintiffs should at all times after February 15 have a quantity of 6000 tons in storage on the River Medway; and by para. 12 that by the agreement of November 29 accommodation in tanks was to be provided for one year from January 15, 1924, and that the plaintiffs Ernest Beck & Co., Ld., were to give six months' notice of the estimated date of arrival of any steamer bringing oil in bulk for storage under the contracts. They further insisted (para. 18) that the plaintiffs had committed breaches of contract in that (*a*) they failed and neglected to make the first delivery between January 15 and February 15, 1924, and did not at any time have the requisite quantity of oil in storage; and (*b*) they failed to give notice of the estimated date of the arrival of the steamer by which the first delivery was to be made. The defendants contended (para. 19) that the plaintiffs had thereby wrongfully determined the agreements and exonerated and discharged the defendants from performance thereof. By way of counterclaim the defendants repeated paras. 11, 12 and 18 of their defence, and claimed 46,462*l.* 14*s.* 2*d.* damages for breach of contract by the plaintiffs. In their reply and defence to the counterclaim the plaintiffs denied that they had committed any breach of the contract to deliver on February 15, first because of the verbal contract to postpone the date of the first

delivery, which they had already alleged in their statement of claim; secondly, because the defendants were never ready and willing to provide the accommodation in tanks required by the agreement of November 29; and thirdly, because the defendants had failed to fulfil a stipulation in the agreement of November 28 that they would give the plaintiffs, if so required, a floating banker's guarantee for payment of the price of 4000 tons of oil to be delivered under the contract. They further alleged that the defendants had abstained from procuring a banker's guarantee in order to induce the plaintiffs' sellers, the All Russian Naphtha Syndicate, to break their contract with the plaintiffs with the object of preventing the plaintiffs from performing their contract with the defendants.

The case was entered in the commercial list and heard before MacKinnon J. without a jury. Judgment was given on June 22, 1925. The learned judge found that the plaintiffs had broken the contract and that the defendants had not broken it; but that the plaintiffs' breach had caused no damage to the defendants. In the result he gave judgment for the defendants on the claim and for the plaintiffs on the counterclaim. The formal judgment was drawn up in these terms: "It is this day adjudged that the defendants recover from both plaintiffs their costs on the claim to be taxed And it is further adjudged that the plaintiffs recover from the defendants their costs on the counterclaim to be taxed. . . . ."

Both parties appealed. The appeal was heard, and on November 5, 1925, the Court (Bankes, Scrutton and Atkin L.JJ.) reversed the judgment of MacKinnon J. and gave judgment for the plaintiffs on the ground that the defendants in omitting to give a floating banker's guarantee when requested, had failed to perform a condition precedent to the plaintiffs' liability to make the first delivery under the contract by February 15, 1924.

On an appeal to the House of Lords the judgment of the Court of Appeal was reversed on July 2, 1926, and the judgment of MacKinnon J. was restored and it was ordered

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that the Continental Contractors, Ld. (the respondents in the House of Lords), should pay to the Medway Oil Company, Ld., the costs incurred by them in the Court of Appeal and also the costs incurred by them in respect of the appeal to the House of Lords; and the cause was remitted back to the King's Bench Division to do therein as should be just and consistent with the judgment of the House of Lords.

In the course of the taxation a difference arose between the parties as to the principle to be applied. For the purpose of obtaining a ruling upon the question the Taxing Master made a report explaining the lines upon which he proposed to proceed. The report contained the following passage: "Where the defendant succeeds on his defence and fails on his counterclaim he is entitled indeed to the costs which he has actually and properly incurred in defeating the plaintiff's claim, but he is not entitled to anything more: that is, he is not entitled to any costs which he would not have incurred if he had not counterclaimed. Conversely the plaintiff who has failed on his claim and succeeded in defeating the defendant's counterclaim is not entitled to any costs of maintaining his claim, for on this he has failed, but he is entitled to those costs which he would not have incurred had he not been compelled to meet the counterclaim. Thus in the case supposed the plaintiff gets no general costs of the action (as distinct from the counterclaim) for his claim fails, but he does get the added costs which he has incurred in consequence of the defendant's counterclaim, while the defendant gets the general costs of the action for he succeeds in defeating it, but he does not get the added costs which he had incurred solely in bringing and maintaining his counterclaim, since he has failed to maintain it. . . . . As to the present it seemed to me . . . . that the only issue at the trial on the claim was that the plaintiffs affirmed and the defendants denied that there had been an agreement to extend the contract time for delivery. So far as the counterclaim was concerned it seemed to me to be a claim for damages for breach of the contract by failing to deliver and also by failing

to give notice of the anticipated date of arrival of the shipments. To this the plaintiffs opposed two separate defences, alleging (*a*) that the failure was owing to the defendants' own default in not providing adequate tank accommodation, that is, that the oil could not be delivered because there was nowhere to deliver it, and (*b*) that the defendants had not complied with the terms of the contract by procuring a certain guarantee. On both these points the plaintiffs succeeded." [This was an error. The defendants succeeded; but the learned judge dismissed the counterclaim because the plaintiffs' breach caused no damage to the defendants.]

Upon this report the parties appeared before the learned judge on February 7, 1927. Counsel for the plaintiffs, while objecting to the form in which the question was being raised, stated that the dispute between the parties was whether the case was governed by *Christie* v. *Platt* (1), as he contended, or by *Wilson* v. *Walters* (2), as the defendants contended. Counsel for the defendants insisted that they were entitled to all the costs of the issue of the alleged ageeement to postpone deliveries, the alleged default in procuring the banker's guarantee and the alleged unreadiness to take delivery for want of storage on February 15, and that the last two matters arose entirely on the claim and had nothing to do with the counterclaim. The learned judge expressed the opinion that, with the exception of the error mentioned above, the Taxing Master was proceeding upon the right principle.

The costs were then taxed upon the footing that there were four principal questions in dispute between the parties: (1.) Did the parties agree that the date of delivery should be postponed; (2.) Did the defendants provide sufficient accommodation to receive the first delivery of oil, or could they have provided accommodation at the various dates of delivery; (3.) Were the defendants in default with regard to the banker's guarantees; and (4.) Did the defendants induce the All Russian Naphtha Syndicate to break their contract with the plaintiffs. Of these questions the Taxing Master treated the first alone as arising upon the claim and defence;

(1) [1921] 2 K. B. 17. (2) [1926] 1 K. B. 511.

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the other three he treated as arising only on the counterclaim. Acting upon this view he gave his certificate allowing the plaintiffs 2033*l.* 4*s.* 4*d.* as their costs of the counterclaim and of the cross-appeal to the Court of Appeal, and allowing the defendants 913*l.* 15*s.* 8*d.* as their costs of the claim and 409*l.* 4*s.* 5*d.* as their costs of the appeal, together 1323*l.* 0*s.* 1*d.*

The defendants took objection to the principle on which the costs had been taxed. They contended that the questions numbered 2, 3, and 4 arose upon the claim and defence, as all three were material upon the main question raised by the defence—namely, whether the plaintiffs themselves had committed a fundamental breach of the contracts in not making the first delivery by February 15, 1924. In particular they objected that they had only been allowed about three-sevenths of the cost of instructions for the brief and of their counsel's fees. In his answer to the objections the Taxing Master replied that the only way in which he could give proper effect to the decision of the House of Lords was by assuming the complete defeat of both parties in respect of their affirmative claims, and that he had answered the objections accordingly. With regard to counsel's fees he replied that the fees he had allowed were appropriate to the task of defeating the plaintiffs' claim, which "stood or fell by the agreement to postpone deliveries."

On May 17, 1927, the defendants took out a summons to review the principle upon which the whole of the bills of both parties had been taxed and also the amounts allowed for various charges including counsel's fees.

The summons was heard by MacKinnon J. on June 2, 1927. The learned judge, after stating the four questions raised in the proceedings, held that the Taxing Master was wrong in treating the first as being the only one involved in the claim and defence and so only allowing the defendants the costs they had incurred in litigating that matter; in the learned judge's view the third and fourth questions arose only on the claim and defence, and the defendants ought to have been allowed the whole of their costs properly incurred upon these questions and nothing ought to have been allowed

to the plaintiffs in respect of them. With regard to the second question—the readiness of the defendants to provide accommodation—he expressed his opinion as follows: "That question I think arises both upon the claim and upon the counterclaim. Counsel for the plaintiffs suggested that in that case the costs ought to be apportioned. I think that the proper principle to apply is that which is stated in *Wilson* v. *Walters* (1)—namely, that where a matter arises both on the claim and the counterclaim the defendants (plaintiffs on the counterclaim) are only entitled to such extra costs as were occasioned by the counterclaim. That principle is I think accurately stated in this way: Where the defendant succeeds on his defence and fails on his counterclaim he is entitled to the costs which he has actually and properly incurred in defeating the plaintiff's claim, but he is not entitled to anything more: that is, he is not entitled to any costs which he would not have incurred if he had not counterclaimed. This question concerning the storage in tanks was a question arising on the claim and defence. Therefore the defendants are entitled to their costs of litigating that question, because they properly incurred them in defeating the plaintiffs' claim. Conversely the plaintiffs having failed on their claim, though they succeeded in defeating the counterclaim, are not entitled to any costs incurred in and about this question of the storage, but they are entitled to those costs which they would not have incurred if they had not been compelled to meet the counterclaim. The plaintiffs therefore are not entitled to the costs they incurred upon this question of their opponents' readiness to supply storage, because they would have incurred those costs even if there had been no counterclaim. The only costs of the counterclaim which the plaintiffs are entitled to recover are those which they only incurred by reason of the counterclaim and which they would not have incurred if there had been no counterclaim." It was therefore ordered that the main objection of the defendants—namely, their objection to the principle on which the taxation had proceeded—should be allowed, and that the Taxing Master

(1) [1926] 1 K. B. 511.

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should retax the bills of costs and vary his certificate accordingly.

The plaintiffs appealed.

Cyril Atkinson K.C. and *Roland Burrows* for the appellants. The learned judge was right in holding that the question of the respondents' readiness to provide storage arose upon the claim and defence. But he was wrong in holding that therefore they were entitled to the whole of their costs incurred in and about that question, notwithstanding that the same question arose upon the counterclaim. In so holding he followed *Wilson* v. *Walters* (1), but that case is inconsistent with *Christie* v. *Platt* (2) and ought not to be followed. Where the same matter arises on claim and counterclaim, and one party gets the costs of the claim and the other party gets the costs of the counterclaim, by what method can one reach the conclusion that all the costs of litigating the matter must needs go to the party who succeeds on the claim? Only by ignoring the counterclaim when taxing the costs of the claim and by taking due notice, or more than due notice, of the claim when taxing the costs of the counterclaim. This method, which found some support in *Saner* v. *Bilton* (3), was disapproved in *Christie* v. *Platt* (2), a case which is binding on this Court; and the method really rests upon no principle of reason or justice. Where the same matter arises on claim and counterclaim and one party gets the costs of the claim and the other party gets the costs of the counterclaim, the costs of litigating the matter in question ought in common fairness to be apportioned between the parties.

Van den Berg for the respondents relied on *Saner* v. *Bilton* (3); *Mason* v. *Brentinl* (4); *Atlas Metal Co.* v. *Miller* (5); and *Wilson* v. *Walters*. (1)

[*Crean* v. *M'Millan* (6) was also cited.]

Cur. adv. vult.

(1) [1926] 1 K. B. 511.
(2) [1921] 2 K. B. 17.
(3) 11 Ch. D. 416.
(4) (1880) 15 Ch. D. 287.
(5) [1898] 2 Q. B. 500.
(6) [1922] 2 I. R. 105.

July 26. The following written judgments were delivered:—

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BANKES L.J. This appeal from an order of MacKinnon J. raises the much debated question of how the costs should be taxed in cases where orders have been made for payment of the costs of the claim by one of the parties to the action, and of the counterclaim by the other party. The question in the present case does not really turn upon what the rule in such cases is, but as the authorities upon the point have been cited and discussed, I will express my opinion on the question quite shortly.

In his judgment in the recent case of *Wilson* v. *Walters* (1) Scrutton L.J. refers with approval to the judgment of O'Connor L.J. in the Irish case of *Crean* v. *M'Millan*. (2) There is much in that judgment which is instructive, though I am not prepared to accept all that the Lord Justice says. There is, however, one passage in his judgment, and one in the judgment of Andrews L.J., with both of which I cordially agree. The first passage is where O'Connor L.J., in criticizing the opinion of Fry J. in *Saner* v. *Bilton* (3) that the principle upon which a taxation should proceed is rested upon expediency, says that he prefers to speak of it as resting on justice. The other passage is where Andrews L.J. in referring to the case of *Christie* v. *Platt* (4) says that that case only illustrates the absurdity of trying to lay down any one rule which must govern all cases. The perusal of the judgment in *Crean* v. *M'Millan* (2), as well as other judgments in which all the decisions upon this particular question of taxation have been reviewed, drives me to the conclusion that the path leading to justice is obscured by the number of these decisions, and the variety of judicial opinions upon the point, and that a clear way to arriving at the desired result will be found by concentrating on the view expressed by Atkin L.J. in *Christie* v. *Platt* (5)—namely, that what the Master has to ascertain is what costs have in truth and in fact been

(1) [1926] 1 K. B. 511.
(2) [1922] 2 I. R. 105, 112.
(3) 11 Ch. D. 416.
(4) [1921] 2 K. B. 17.
(5) [1921] 2 K. B. 22, 25.

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incurred by the one party and by the other to whom costs have been awarded. This cannot in my opinion be ascertained by any rigid application of a principle or a formula applicable to all cases. Each case must be separately examined and all the circumstances involved in the fighting of the issues must be examined, as well as the mere issues themselves. As an illustration I will refer to a case that was put during the argument in the case of *Hilliard* v. *Dugon*. (1) It was said, take the case of a collision between two motor vehicles where both drivers were injured, the one only slightly, the other very seriously; the respective insurance companies had taken the matter up and each had instructed its solicitor to take proceedings; the solicitors for the insurance company interested in the case of the driver only slightly injured were the first to commence proceedings, and the less injured driver consequently became the plaintiff in the action; both claim and counterclaim were dismissed with costs; in support of so much of the plaintiff's claim as related to the extent of his personal injuries it would have been necessary to call only his own medical man, a general practitioner; but in view of the very serious nature of the counterclaim it was essential to be provided with the opinion of specialists of position and standing; as these gentlemen had to be present at the trial they were called as witnesses for the plaintiff in support of his case and the services of his own medical man were dispensed with; on taxation no attention ought in my opinion to be given to the fact that one of the two parties happened to be plaintiff, nor ought the fees of these specialists, if justice is to be done, to be treated as solely occasioned by the claim or solely occasioned by the counterclaim, but a fair adjustment should be made, which if I was acting as the Taxing Master would be by treating a small portion of the costs of these witnesses, or possibly of one of them, as costs of the claim, and a substantial portion as costs of the counterclaim. This view is I think in accordance not only with the decision in *Christie* v. *Platt* (2) but with the unreported case of *Hilliard* v. *Dugon* (1), both of which

(1) June 18, 1921. Unreported. (2) [1921] 2 K. B. 17.

were cases in this Court, and which therefore we must follow. There is nothing in my opinion in the decision of *Wilson* v. *Walters* (1), regard being had to the facts of that case, which is inconsistent with the above mentioned decisions in this Court; but if there are passages in the judgments which appear to be inconsistent with the decision in *Christie* v. *Platt* (2), it is the latter decision which must prevail.

I pass now to consider what is the real difficulty in the present case—namely, to arrive at what for the purposes of a just taxation were the issues in the present case. For this purpose, as I shall indicate later, it does not appear to me that the question of what from the pleading point of view were the issues in the action is an infallible guide to what costs should be allowed. The substance of the main claim in the action by sellers against buyers was for damages for repudiating a contract to take delivery of a large quantity of oil within the original contract time, that time having been extended at the request of the buyers because their tanks were not sufficiently completed to take the oil. The subsidiary claim was for breach of an agreement to take all the oil they required from the plaintiffs. By their defence the defendants denied that any extension of time had been asked for or given, and they counterclaimed for damages, asserting that the breaches of contract on the part of the plaintiffs justified their putting an end to the contract. By their reply the plaintiffs for the first time in their pleadings set up as a justification for the non-fulfilment of their contract the alleged failure to provide tankage accommodation. They also in the amended reply for the first time set up as an answer to the defendants' counterclaim a failure on the part of the defendants to give the guarantee required by the contract. The action was tried by MacKinnon J. He dismissed both the claim and the counterclaim with costs. As he explained when the matter was brought before him on a later occasion, he dismissed the counterclaim not because the defendants had been in any default in carrying out the terms of their contract, but because they had suffered no

(1) [1926] 1 K. B. 511. (2) [1921] 2 K. B. 17.

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damage, having been enabled to supply themselves with oil at a less price than the contract price. Whether under these circumstances judgment should have been entered for the plaintiffs on the counterclaim is not now in question. The order of the learned judge dismissing the counterclaim with costs, though challenged both in this Court and in the House of Lords, was not seriously criticized in either place, and it stands and must be accepted as a direction as to how the costs are to be taxed. Both before the learned judge and in this Court the matter has been treated as one in which four issues or points of controversy were raised. (1.) Whether there was an agreement to extend the time for the delivery of the oil. (2.) Whether the tanks of the defendants were ready to receive the oil at the contract dates of delivery. (3.) The questions which were involved in regard to the giving of the guarantee. (4.) The question of the alleged arrangement with the suppliers to the plaintiffs whereby the plaintiffs were prevented from obtaining the oil. The Master has treated the whole of the costs incurred under the last three heads as solely attributable to the counterclaim, and has taxed the bills accordingly, allowing the plaintiffs as their costs of the counterclaim and cross-appeal 2033*l.* 4*s.* 4*d.*, and the defendants of the claim 913*l.* 15*s.* 8*d.*, and of the appeal 409*l.* 4*s.* 5*d.*, together 1323*l.* 0*s.* 1*d.* Against this taxation the defendants appealed, alleging that the taxation had proceeded upon a wrong principle, and that as the successful parties in the action it was unjust that on balance they should be called upon to pay the plaintiffs any such amount as 700*l.*, that sum being the difference between the amount allowed to the plaintiffs and the amount allowed to them. The appeal came before MacKinnon J. and he directed a re-taxation of the costs. From this order the present appeal is made.

The points on which the judge differed from the Master were that he considered that the question under heads 3 and 4 arose solely upon the claim, whereas the Master had treated them as well as the question under head 2 as arising solely upon the counterclaim, and he considered that the

question under head 2 was common to both claim and counterclaim, but in reference to the latter he considered that no apportionment should be made. With respect to both the Master and the judge I cannot agree with the view of either of them. In considering what the real contest between the parties under each of these heads was, I do not think that justice can be done except by treating the costs of the litigation under each head as costs which must be apportioned if the order as to costs is to be complied with.

For these reasons I think that the order for a retaxation must stand, but it must be in accordance with the judgment of this Court, and the order of MacKinnon J. must be varied accordingly. As the appellants have succeeded they must have the costs of the appeal and before the judge. It will be for the Taxing Master in his discretion to say what in his opinion is a fair apportionment as between the two parties of the various items falling under these several heads.

ATKIN L.J. In this case judgment was eventually entered for the defendants on the claim with costs, and for the plaintiffs on the counterclaim with costs. It appears to me that the provisions of Order LXV., r. 2, do not apply: that no separate issues in fact and law were raised upon claim or counterclaim and decided for either party so as to produce an event other than the final event, the failure of both claim and counterclaim. Moreover, if *Bush* v. *Rogers* (1) is to be treated as an authority that the provisions of that rule can only be brought into effect by an order of the trial judge defining the issues, it is plain that the learned judge did not make such an order at the trial; or thereafter, if thereafter he had any jurisdiction to do so. I think therefore that the learned Master was correct in his general answer to the objections in "assuming the complete defeat of each party in respect of his affirmative claims." This however leaves open the question whether there were costs incurred over matters which were common to both claim and counterclaim,

(1) [1915] 1 K. B. 707.

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Atkin L.J.

and if so upon whom such costs should fall. The pleadings seem to disclose the following contentions: (1.) The plaintiff sued for 62,000*l.* damages for breach of a contract to take oil, alleging a verbal agreement to extend the first date of delivery to March 15, 1924, and relying upon an alleged repudiation in writing, dated February 18, 1924. (2.) The defendants denied the verbal extension of the time and relied upon a fundamental breach by the plaintiffs—namely, a failure to deliver any oil by February 15. (3.) The plaintiffs in reply said that they had committed no breach on February 15, because (*a*) the time was extended as originally alleged, (*b*) the defendants had committed a breach of a condition precedent—namely, a condition that they would provide on request a banker's guarantee, (*c*) the defendants were not ready and willing to take delivery on February 15, for their tanks were not ready on that date to receive the oil. Those seem to me to be the matters raised on the claim. The defendants counterclaimed on their part against the plaintiffs for 46,000*l.* damages for breach of the same contract in not delivering the oil. They raised on their counterclaim the same matters that they had alleged as a defence, and the plaintiffs raised in defence to the counterclaim the verbal extension of the time and the other matters that they had alleged in reply to the defence. In addition they raised for the first time in their defence to counterclaim a suggestion that the defendants had themselves procured the plaintiffs' inability, if any, to deliver the oil by collusion with the plaintiffs' suppliers. At the hearing this matter was also treated as matter of reply to the defence. In the result it appears to me that there were a substantial claim and a substantial counterclaim arising out of the same contract, and that except as to the amount of the respective damages, all the substantial contentions on either side were common to both claim and counterclaim.

The question arises how the costs are to be taxed on a judgment which gives the costs of the claim to the defendants and the costs of the counterclaim to the plaintiffs. This point as to the costs of items common to claim and counterclaim

arose in the Court of Appeal in *Christie* v. *Platt*. (1) There the plaintiff sued for rent of a furnished house, the defendant raised as a defence the contention that it was uninhabitable and repeated the allegation by way of counterclaim and claimed damages. The question whether it was uninhabitable was therefore common to claim and counterclaim. It was not a good plea in law to the claim, but that in itself is obviously no reason for not awarding costs to a plaintiff who incurs costs in resisting it. The plaintiff succeeded with costs in the claim for rent not otherwise disputed, and the defendant succeeded with costs in the counterclaim for damages exceeding the rent. The Master had allowed the plaintiff 214*l*. costs and the defendant 3*l*. He had taxed the costs, as he said, on the footing that he had to inquire whether the item would have been reasonable had there been no counterclaim; and as to the costs of the counterclaim he had inquired, is this an item which was incurred by reason of the counterclaim? He came to the conclusion that the whole of the witnesses were called for the defence and their allowances were not increased by the counterclaim; they would have been necessary if there had been no counterclaim. Younger L.J. and myself considered all the cases on the topic of taxation of costs common to claim and counterclaim. We were aware that there had been conflicting decisions and dicta in the Courts of first instance and the Court of Appeal, and we had in mind in particular the decision of Lindley and Chitty L.JJ. in *Atlas Metal Co.* v. *Miller* (2), which appeared to be an authoritative statement of the practice. As a result we came to the conclusion expressed in the judgment in that case, holding that the Master was wrong in principle and remitting the case for taxation. I have nothing to vary in that judgment, which appears to be binding upon the Court of Appeal. Since that case there has been decided by a Divisional Court, consisting of Scrutton and Sargant L.JJ., the case of *Wilson* v. *Walters*. (3) The judgments in that case distinguish

(1) [1921] 2 K. B. 17. (2) [1898] 2 Q. B. 500.
(3) [1926] 1 K. B. 511.

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Christie v. *Platt* (1), but I am unable to reconcile the two decisions. It appears to me that the later case applies principles which we intentionally discarded in *Christie* v. *Platt* (1) as working in practice the injustice complained of in that case. The case of *Christie* v. *Platt* (1) was under discussion in the Irish Courts in *Crean* v. *M'Millan*. (2) That was a case where the plaintiff sued for the price of goods bargained and sold and for 346*l.* damages for non-acceptance, and the defendants counterclaimed for 57*l.* damages for non-delivery, the claim and counterclaim turning upon investigation of the same facts. Both plaintiff and defendant failed. The Master in taxing had given the defendant all the general costs of the action and had only given the plaintiff such costs as were incurred solely by reason of the counterclaim, and had allowed none of the costs that would have been incurred if there were no counterclaim, and allowed altogether only 5*l.* It appears that in the proofs and brief for the plaintiff there was no mention of the counterclaim or any instructions as to damages on counterclaim. The result of the taxation was therefore apparently in accord with the principle laid down in *Christie* v. *Platt*. (1) But I cannot agree with some of the judgments delivered, notably so much of the judgment of O'Connor L.J. as appears to approve the application of the rule in *Saner* v. *Bilton*. (3) I prefer the judgment of the late Ronan L.J. and would accept as substantially correct the first three principles laid down by Andrews L.J. with the exception of the last words, "or where both claim and counterclaim arise out of the one transaction and in effect raise the same issue."

By reason of the later cases I will add a few words to what I said in *Christie* v. *Platt*. (1) The question is in every case what are the costs reasonably occasioned by the claim? what are the costs reasonably occasioned by the counterclaim? The plaintiff in an action bases his claim on the allegation that a certain event or events occurred, for example that the defendant was negligent or broke his contract; presumably

(1) [1921] 2 K. B. 17. (2) [1922] 2 I. R. 105.
(3) 11 Ch. D. 416.

he is from the commencement of the action prepared to prove the event as he alleges. The defendant meets the claim by saying the alleged events did not occur, but goes on to say that the real events were that the plaintiff was negligent or broke the contract, and counterclaims. The same evidence is relevant on both contentions. It appears to me that after the counterclaim is put in the plaintiff is in a different position. On the claim alone he had to incur expense to support his claim; with the counterclaim delivered he has to incur expense to resist his opponent's claim. The claim involves recoupment of loss, the counterclaim exposes him to further loss possibly affecting his whole fortune. The determination of the event has a double interest to him, and in seeking to prove it the expenses he incurs are occasioned not by the claim alone or by the counterclaim alone, but by both. It appears to me wrong both in law and in fact to say that when a man sues for 62,000*l.* and is sued in counterclaim for 46,000*l.*, and the event is to be determined by consideration of the same evidence, he incurs all the cost of evidence because of the claim. He seems to me obviously to incur the cost because of both; in other words the costs are occasioned by both. And it is quite irrelevant as to such costs to consider what he would have incurred if there were no counterclaim, that is with no other cause operating. The result of the rule now laid down is that where there is a substantial counterclaim involving common evidence, the Master will apportion. But apportion does not necessarily mean divide into equal moieties. He will decide how much in fact should be attributed to the claim; how much to the counterclaim. Nor does the rule preclude him in appropriate cases from finding all the costs or substantially all to have been in truth and in fact occasioned by claim or counterclaim. Some counterclaims are merely intended to be consequential upon the defence, as where there is a defence of fraud and a counterclaim for delivery up of the document or a declaration of non-liability. Some counterclaims have no substance, as in *Crean* v. *M'Millan*. (1) In other cases the Master has

(1) [1922] 2 I. R. 105.

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grounds for concluding that all the costs were in fact incurred in meeting the claim, as in the unreported case of *Hilliard* v. *Dugon* (1), decided on June 18, 1921, in this Court. The opposing principle seems to give to an order for costs of the counterclaim the same effect as though a counterclaim were an issue in an action in respect of which an order was made in the terms of Order LXV., r. 2. The reason given by Fry J. in *Saner* v. *Bilton* (2), that the plaintiff is to be regarded as letting loose the waters of litigation, and therefore if unsuccessful is to be in a worse position than an unsuccessful counterclaimant, appears to me with respect to be unsatisfactory. I see no reason for inflicting punishment on any one for bringing a bona fide dispute before the Courts in excess of his obligation to pay the costs actually occasioned to his opponent, and if the question who began the litigation were really material, it would often be found that the effective cause was the defendant, and that the plaintiff's writ was due to his having won the race to be first in the contest brought about by the defendant.

It follows that the principles adopted by both Master and judge cannot be approved; and the case must be remitted for taxation on the lines laid down in this Court. The plaintiffs should have their costs here and before the judge.

LAWRENCE L.J. This appeal raises once again the vexed question what is the proper principle of taxation in cases where the plaintiff has failed in his claim and the defendant has failed in his counterclaim and the Court has dismissed both the action and the counterclaim with costs.

It is apparent from the authorities that there is no consensus of judicial opinion on this question, and the Taxing Masters may well be in doubt as to the right principle to apply. There appear to me to be three divergent views, in support of each of which authority may be found either in actual decisions or in judicial dicta. Speaking for myself I find it impossible to reconcile all of the decisions and dicta. Although I propose to confine my judgment to the principles

(1) Unreported. (2) 11 Ch. D. 416.

applicable to cases in which the Court has dismissed the action and the counterclaim with costs, the same principles in my opinion apply conversely to cases in which both parties have succeeded, and the Court has ordered the defendant to pay the costs of the action and the plaintiff to pay the costs of the counterclaim.

The first view is that the proper principle of taxation is to treat the counterclaim as being in effect a cross-action, and to allow to the defendant the costs which he had in fact incurred in defending the action as if there had been no counterclaim, and to allow to the plaintiff the costs which he had in fact incurred in resisting the counterclaim as if there had been no action: for example, see *Atlas Metal Co.* v. *Miller* (1); and *Christie* v. *Platt.* (2)

The second view is that the proper principle of taxation is to allow to the defendant the costs of the action as if there had been no counterclaim, and to allow to the plaintiff only the extra costs occasioned by the counterclaim, that is to say, only the amount by which his costs of action had been increased by the counterclaim: for example, see *Saner* v. *Bilton* (3) and *Wilson* v. *Walters.* (4)

And the third view is that the proper principle of taxation is a combination of the two previously mentioned principles—namely, that if the counterclaim raises a separate and substantial question the first of the above mentioned principles is the proper principle of taxation, whereas if the subject-matter of the counterclaim is substantially the same as the defence, or part of the defence, the second of the above principles is the proper principle of taxation: see *Crean* v. *M'Millan.* (5)

Before considering which of these three principles is the proper principle of taxation, it is necessary to explain what I consider to be their effect in practice. In applying the first of these principles the Taxing Master would have to allow to the plaintiff all such costs as he had in truth and in fact

(1) [1898] 2 Q. B. 500.
(2) [1921] 2 K. B. 17.
(3) 11 Ch. D. 416
(4) [1926] 1 K. B. 511.
(5) [1922] 2 I. R. 105.

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incurred in opposing the counterclaim, and would have to allow to the defendant all such costs as he had in truth and in fact incurred in defending the action. In taxing the plaintiff's costs of the counterclaim on this principle, no allowance would of course be made in respect of any costs which the plaintiff had been spared by reason of the counterclaim being made in the action instead of in a separate cross-action; on the other hand every item of costs properly incurred by the plaintiff which is common both to the action and to the counterclaim would have to be considered on its merits, and the Taxing Master would have to apportion to the counterclaim such portion of the common item as he in his discretion should consider had been incurred by reason of the counterclaim. Thus the plaintiff would get no costs of the counterclaim until after it had been delivered, but from the time of its delivery he would get such costs as he had in truth and in fact incurred in opposing the counterclaim, although at the same time he had been incurring costs in prosecuting his claim. Taking as an example the fee paid to the plaintiff's counsel on his brief at the trial; this would fall to be apportioned between the action and counterclaim on the principle I have mentioned, and the plaintiff would be allowed such part of the fee as the Taxing Master in his discretion considered to have been incurred by reason of the counterclaim, notwithstanding that the whole fee did not exceed in amount the fee which would properly have been payable if there had been no counterclaim. In the same way, in taxing the defendant's costs of the action, the Taxing Master would have to investigate every item of costs common to the action and to the counterclaim, and to apportion to the action the part in truth and in fact incurred in defending the action, although the defendant had at the same time been incurring costs in prosecuting his counterclaim.

In applying the second of the above mentioned principles the Taxing Master would have to allow to the defendant the full costs of the action excluding only the amount by which those costs were increased by the counterclaim, and would have to allow to the plaintiff only the extra costs

occasioned by the counterclaim—namely, the amount by which his costs of action had been increased by the counterclaim. In such a case there would be no apportionment of any items common to both the action and the counterclaim unless the plaintiff could prove that the common item had been increased by reason of the counterclaim, and then he would only be allowed such increase. Thus in the example I have given the Taxing Master would make no allowance to the plaintiff for counsel's fee on the trial, if that fee did not exceed an amount which might properly have been allowed if there had been no counterclaim.

In applying the third of the above mentioned principles the Taxing Master, before commencing the taxation, would have to determine upon which of two different principles he was going to tax, and for that purpose he would have to decide whether the counterclaim did or did not raise a separate and substantial question, or whether the subject-matter of the counterclaim was or was not substantially the same as the defence or part of the defence, and then, according to his decision on that preliminary point, he would have to tax the costs, either on the first or on the second of the above mentioned principles.

No useful purpose would, in my opinion, be served by a detailed examination of the authorities; they are all discussed and commented upon at length in the cases which I have mentioned. What I deduce from the authorities is that the only proper principle of taxation generally applicable to all cases of the kind under consideration, is the first of the above mentioned principles, which moreover is laid down as the proper principle of taxation in *Christie* v. *Platt* (1), a case binding on this Court. This principle is elastic; it does not bind the Taxing Master down to any set formula, but on the contrary allows him ample latitude, and in applying it he can do substantial justice in every case. In dealing with common items he should take into account whether the counterclaim raises a separate question, whether it is substantial or unsubstantial, and whether it is or is not

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based on the same facts as the claim, and should exercise his discretion in apportioning such items accordingly. As regards the second of the above mentioned principles, I am of opinion there are valid reasons why it should not be adopted as a general principle of taxation. Under the express provisions of the Judicature Act and of the Rules, a counterclaim is for all purposes of procedure and evidence placed upon the same footing as a cross-action, and may be proceeded with although the action be stayed, discontinued or dismissed. The application of this second principle of taxation, however, places the counterclaim in the same position as if it were an issue in the action upon which the plaintiff had succeeded, and as if at the trial the judge had made an order upon the defendant to pay the amount by which the plaintiff's costs of action had been increased by reason of such issue. In some cases no doubt the application of this principle may work substantial justice, for example, where the success or failure of the counterclaim is merely consequential upon the success or failure of the claim, or where the counterclaim is really in the nature of a defence. On the other hand in many cases the application of this principle would obviously work injustice, for example, where the counterclaim raises a separate and substantial question, or where the real controversy between the parties is raised by the counterclaim, and the plaintiff has forestalled the defendant in order to gain the advantage of being in the position of plaintiff. *Christie* v. *Platt* (1) furnishes a striking example of a case in which injustice would result from the application of this principle. Even in cases where a substantial counterclaim is based on the same facts as the claim, the application of this principle may work an injustice, e.g., in the example given in the judgment of Bankes L.J. In my opinion there is no valid reason why the plaintiff should not be allowed such costs as he has in truth and in fact incurred in resisting the counterclaim, merely because the facts are common to both claim and counterclaim, and because the defendant has been able to take advantage of

(1) [1921] 2 K. B. 17.

the cheaper procedure by way of counterclaim afforded to him by the Judicature Acts and the Rules. In such cases the unsuccessful counterclaiming defendant would still reap considerable advantage if the first of the above mentioned principles of taxation were applied, as he would not only be saved the initial expenses of commencing a separate cross-action but also would have to pay only an apportioned part of all common items, which in a separate cross-action he would, for the most part, have to pay in full. In my opinion the taxation of the plaintiff's costs of the counterclaim on the second of the above mentioned principles, should only take place where a special order to that effect has been made. Moreover, I think that the Court ought to exercise great caution in making any such special order, as in most cases the judge is not in a position to know merely from what takes place at the trial what costs the plaintiff has in truth and in fact incurred in resisting a counterclaim. It often happens that the plaintiff has had to make serious preparations, and to incur substantial costs, in meeting an apparently substantial counterclaim, only to find at the trial that it is abandoned or minimized under the advice of leading counsel in such a way as to produce the impression on the Court that it was never put forward seriously. The Taxing Master on the other hand sees the advice on evidence, the proofs of witnesses, and the brief, and is therefore in a far better position than the judge to arrive at a just conclusion as to what costs the plaintiff has in truth and in fact incurred in resisting the counterclaim, and can exercise his discretion in apportioning all common items of costs accordingly.

As regards the third of the above mentioned principles, although at first sight it seems to approximate closely to the first principle, I am of opinion that it is objectionable in that it places all counterclaims, however substantial, if based on the same facts as the claim, in the same category as unsubstantial and consequential counterclaims; moreover it has this serious disadvantage that it compels the Taxing Master before commencing the taxation to decide which of two different principles he is going to apply to the taxation.

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The duty of determining this preliminary point would not only lead to a serious contest between the parties, but would also in most cases lead to an application by the dissatisfied party to review the taxation. Many cases are on the border line and in such cases there might be a real difficulty in determining which of the two principles ought to be adopted, whereas if the first of the above mentioned principles were applied, the allowances and disallowances in respect of all common items would be reduced to questions of quantum only and finality would thus be assured. Turning to the present case I am of opinion that neither the Taxing Master nor the learned judge has applied the proper principle of taxation. In my judgment all the four issues raised in the pleadings and at the trial are common both to the action and to the counterclaim, though in a varying degree, and in taxing the bills of costs of the parties in accordance with the terms of the order the Taxing Master should apply the first of the above mentioned principles as above explained.

In the result therefore these bills of costs must be remitted to the Taxing Master for re-taxation, and as the plaintiffs have substantially succeeded on this appeal they must have their costs here and below.

Appeal allowed.

Solicitors for appellants: *Dehn & Lauderdale.*
Solicitors for respondents: *Cosmo Cran & Co.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1927
Oct. 13.

NANCE *v.* NAYLOR.

[1927. N. 101.]

Landlord and Tenant—Lease—Forfeiture—Non-payment of Rent—Judgment for Rent and Possession—Agreement by Lessee to give up Possession—Subsequent Application for Relief—Competency—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 46.

A landlord took proceedings in ejectment against his tenant for non-payment of rent, and on May 14, 1927, recovered judgment for possession, rent and mesne profits. In June writs of fi. fa. and possession were delivered to the sheriff's officer for execution, but the tenant asked for further time, and, eventually, on June 28, he signed a document whereby in consideration of the landlord withholding the writ of possession he undertook "to pay out the amount of debt and costs under the fi. fa." and "to give vacant possession of the premises . . . . on or before September 29 next." In July the tenant applied for relief against the forfeiture, and Clauson J. granted his application. On appeal by the landlord:—

Held (Scrutton L.J. with some doubt), that the undertaking signed by the tenant did not preclude the Court from granting relief against the forfeiture.

Appeal from an order of Clauson J.

The plaintiff was the landlord of premises in Reading held on lease by the defendant at a rent of 200*l.* per annum. The lease contained an express proviso for re-entry if the rent or any part thereof should be in arrear for twenty-one days. A quarter's rent being in arrear, the plaintiff recovered judgment against the defendant on May 14, 1927, for possession, rent and mesne profits. In June, 1927, writs of fi. fa. and possession were delivered to the sheriff's officer for execution, but the defendant asked for further time to pay and eventually the defendant, on June 28, 1927, signed a document in the following terms: "In consideration of the plaintiff withholding the above writ of possession, I hereby undertake to pay out the amount of debt and costs under the fi. fa. not later than Friday next, July 1, to give vacant possession of the premises, No. 69 Broad Street, Reading, on or before September 29 next, and also to give independent security

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for the mesne profits from June 25, 1927. I further undertake to carry out the repairs which I am liable for, and of which I have received notice, under the terms of the lease." On that document being signed the sheriff's officer did not execute the writ.

On July 27, 1927, the defendant took out a summons in the Reading District Registry for relief against the forfeiture. On August 2 the registrar refused the application, but, on appeal, Clauson J. granted relief under s. 46 of the Supreme Court of Judicature (Consolidation) Act, 1925. (1)

The plaintiff appealed.

J. B. Matthews K.C. and *Engelbach* for the appellant. The respondent has, for good consideration, bargained away his right to claim relief.

[ATKIN L.J. Is not the question whether the respondent was aware that he was, as you put it, bargaining away that right ?]

Before the respondent can claim relief, he must take steps, if he wants to impugn the agreement, to have it set aside. While it stands, it is binding upon him. His agreement to give vacant possession is quite inconsistent with a right to claim relief from forfeiture.

C. J. Radcliffe for the respondent was not called upon.

SCRUTTON L.J. This case raises a question of some difficulty. It arises in this way : the respondent not having paid the rent due by him at Lady Day, 1927, the appellant, the landlord, brought an action for ejectment for non-payment of the rent. In that action judgment was signed on May 14 that the appellant should recover possession of the premises, 50*l.* as one quarter's rent, and mesne profits. The appellant did not act upon that judgment with undue

(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 46 : "In the case of any action for a forfeiture brought for non-payment of rent, the High Court or a judge thereof shall have power to give relief in a summary manner, and subject to the same terms and conditions in all respects as to payment of rent, costs, and otherwise as could formerly have been imposed in the Court of Chancery. . . . ."

haste; his solicitors wrote to the respondent stating that execution would be issued unless the judgment was complied with by June 24, but that if the rent, mesne profits and costs were paid the order for possession would not be enforced. The respondent did not pay the rent, mesne profits and costs by June 24, whereupon the appellant decided to execute the writ of possession and he informed the respondent to this effect; but an agreement was then entered into by the respondent in the following terms: "In consideration of the [appellant] withholding the above writ of possession, I hereby undertake to pay out the amount of debt and costs under the fi. fa. not later than Friday next, July 1, to give vacant possession of the premises No. 69 Broad Street, Reading, on or before September 29 next, and also to give independent security for the mesne profits from June 25, 1927"—a sum in respect of mesne profits, we are told, was paid so there was no need for security being given—"I further undertake to carry out the repairs which I am liable for, and of which I have received notice, under the terms of the lease." The repairs, I understand, were carried out. But before September 29 the respondent applied under s. 46 of the Supreme Court of Judicature (Consolidation) Act, 1925, for relief from the forfeiture, and the question for our decision is whether Clauson J. was wrong in granting relief in spite of the terms of the agreement by which the respondent undertook to give vacant possession of the premises on or before September 29, where the effect of giving relief would be to allow the respondent to remain in after September 29. The Court has power to grant relief from forfeiture subject to the same terms and conditions as could formerly have been imposed in the Court of Chancery. It is clear that relief could have been given by that Court after the tenant had been turned out of possession, and the effect of granting relief would be to reinstate him. What we have to consider is whether an agreement to give up possession on or before September 29 by virtue of which the respondent escaped being immediately ejected is so inconsistent with the right to grant relief from forfeiture that it must be taken that

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the right to relief is gone. I have felt some doubt upon this point, because it seems to me to be possible to say that an agreement to go out by September 29 is not consistent with the right to stay in after that date; but the right to grant relief is one which the Courts have always jealously preserved in favour of tenants, and after some hesitation and consideration I have come to the conclusion that I cannot say that Clauson J. was wrong in holding that he had power to grant relief from the forfeiture notwithstanding the terms of the agreement. We are informed that Clauson J. declined to express any opinion upon the point whether the agreement could be enforced. I probably ought not to express any opinion either, but it seems to me that if relief is given it should be without prejudice to the appellant's right to sue for damages for breach of the agreement. I do not, however, decide that. In view of the conclusion arrived at by Clauson J., and that arrived at by my colleagues, I do not dissent from their view that there was power to grant relief. The appeal therefore will be dismissed.

ATKIN L.J. I agree. The right to relief from forfeiture is recognized by s. 210 of the Common Law Procedure Act, 1852, which begins by giving the landlord power to recover the demised premises when a half-year's rent is in arrear and there is a right of re-entry. The section then proceeds to say that if the lessee permits judgment to be recovered "and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee . . . . shall be barred and foreclosed from all relief or remedy in law or equity." Sect. 211 provides that if the lessee proceeds in equity he is not to have an injunction or relief without payment of rent and costs. Sect. 1 of the Common Law Procedure Act, 1860, now substantially reproduced in s. 46 of the Supreme Court of Judicature (Consolidation) Act, 1925, says that in the case of ejectment for a forfeiture brought for non-payment of rent, the Court or a judge shall

have power to give relief subject to the same terms and conditions as to payment of rent, costs and otherwise as could formerly have been imposed in the Court of Chancery. It is plain, therefore, that the equitable right thus recognized is a right to proceed for relief within six months after judgment, even if the judgment has been fully executed and possession given under it. In the present case the appellant—the landlord—obtained judgment for the recovery of possession and the writ of execution was duly issued and handed to the sheriff's officer, but then an arrangement was made by which the respondent was given time on the terms of the agreement of June 28. I can quite understand that an agreement might be entered into on the terms that if time were given the respondent would surrender his right to claim relief against forfeiture; or that an agreement might be made upon such terms that an agreement to surrender the right to relief must necessarily be implied; but it is a question of inference in each case whether such a term should be implied. For my part I find great difficulty in implying such a term in a case where there is no evidence that the respondent knew anything about his right to relief against forfeiture. That may not be conclusive, but it does not seem to me that an agreement to allow further time is inconsistent with the right to relief being still subsisting. If the writ of possession had been executed, there can be no doubt that the tenant's right to relief would still exist, and I see no reason why he should not have the same right in this case. That seems to have been the view taken by Clauson J., and I cannot say that he was wrong in granting relief.

GREER L.J. I agree. This appeal turns upon the proper interpretation of the document of June 28, 1927. At that time the appellant was, in law, entitled to have the writ of possession executed and possession of the premises given to him. If the writ had been executed that would not have precluded the respondent from applying for relief. I see no reason why the parties should not agree that for a period of three months till September 29 the writ should not be

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executed and the tenant should go out and give vacant possession on that date, which he was under an obligation to do at the date of the agreement; but the agreement by him to give vacant possession on September 29 does not in my opinion prevent him exercising his right to ask for relief from forfeiture any more than if there had been, as there might have been, an agreement that he might remain in for two or three days after the writ of possession had been issued. To get rid of the right to relief much plainer words would have been necessary. The fact of actually having gone out of possession has no bearing upon the question whether the right to grant relief can be exercised or not. For these reasons and for those given by Atkin L.J. I agree that the appeal fails.

Appeal dismissed.

Solicitors for appellant: *Paice & Cross, for Nance & Son, Reading.*

Solicitors for respondent: *Dodd, Blaker & Handley, Reading.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1927
July 14, 15.

MARBE *v.* GEORGE EDWARDES (DALY'S THEATRE), LIMITED, AND ANOTHER.

[1926. M. 2429.]

Contract—Engagement of Actress—Breach—Damages—Loss of Publicity—Libel—Qualified Privilege—Plaintiff fails to prove Malice—Discretion of Judge—Election of Defendant to call Evidence.

An actress, who had acquired considerable reputation in the United States and was anxious to appear in London in order to add to her popularity, obtained an engagement with the managers of a London theatre to rehearse and play a named part in a named play from a certain date at such times and at such theatres in the West End of London as the managers should from time to time direct at a salary of 100*l.* for every week during the run of the play. By a collateral agreement the managers undertook to advertise the actress's name in a prominent position, and up to the date of the dress rehearsal they duly performed this undertaking. On that date they refused to allow her to appear in the part either on the agreed date or at all. The actress brought an action against the managers claiming damages for breach of contract including damages for injury to her reputation in not being allowed to appear in the part as advertised. The defendants paid the agreed salary up to a certain date, and paid into the Court the balance from that date until the piece ceased to run, and contended that the plaintiff was not entitled to any further damages:—

Held, that the contract imposed an express obligation upon the defendants to allow the plaintiff to appear in the part as agreed, and that damages for breach of that obligation might properly include such a sum as a jury might reasonably award as compensation for loss of reputation.

Turpin v. *Victoria Palace* [1918] 2 K. B. 539 questioned.

In an action of libel, where the defendant establishes a qualified privilege for the publication, and the plaintiff fails to adduce any evidence of malice, the judge is not obliged then and there to withdraw the case from the jury, but, if the defendant proposes to call evidence, may in his discretion defer ruling on the question of malice until he has heard the evidence for the defendant. In the exercise of this discretion the position of a defendant who has to adduce evidence upon other issues in the action should be considered.

APPEAL from the judgment of Horridge J. in an action tried before the learned judge and a special jury.

The plaintiff was an American actress of some considerable reputation in the United States, where she had earned as much as 200*l.* a week. The defendant company was in

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May, 1926, producing at Daly's Theatre, London, a musical play called "Yvonne." The defendant James White was the chairman of the defendant company.

The action was brought (1.) for damages for breach of an agreement dated June 2, 1926, and made between the defendant company, therein called "the manager," of the one part and the plaintiff, therein called "the artist," of the other part; and (2.) for damages for a libel contained in a letter written and published by the defendants through their general manager, on July 29, 1926. The material clauses of the agreement and the letter are set out below. There was originally a further claim for unpaid salary. The writ was issued on August 11, 1926; the statement of claim was delivered on November 8, 1926; by their amended defence delivered on March 22, 1927, the defendants paid into Court 205*l.* which, with 500*l.* paid in on December 17, 1926, they said was sufficient to satisfy the plaintiff's claim for unpaid salary. The plaintiff agreed to accept this sum in respect of salary, and the action proceeded for further damages for breach of the agreement and damages for libel.

The material clauses of the agreement were the following:—

"1. The manager engages the artist to rehearse and play the part of Lolotte in the play called 'Yvonne' from the date of the first rehearsal hereinafter stated at such times and at such theatres in the West End of London as the manager shall from time to time direct, and the artist accepts the said engagement upon the terms and conditions herein appearing." . . . .

"3. (1.) The period of rehearsal shall commence on June 2, 1926, or not later than one week thereafter and shall end on a date to be determined by the manager.

"(2.) The engagement shall commence on June 12 (sic), 1926, or on some day not later than one week thereafter and the run of the play shall commence on the day on which the play is produced.

"4. The manager will pay to the artist—(*a*) during the period of rehearsal such sums (if any) as the artist shall be entitled to in accordance with the regulations set out in the

schedule hereto; and (*b*) from the commencement of the run of the play the sum of 100*l*. for every week as defined in the said regulations and such sums as are therein mentioned for extra performances.

"5. The regulations set out in the schedule hereto shall be deemed to form part of this agreement and shall be binding on the parties hereto."

The schedule contained the following clauses:—

"(iv) The artist shall be deemed to be engaged exclusively by the manager and during the continuance of the engagement will not perform or otherwise exercise . . . . her talent for the benefit of any other company, institution, or person without the written consent of the manager first had and obtained." . . . .

"(x) If for any reason the manager shall find himself unable to produce the play he shall be at liberty by notice in writing to the artist to terminate the engagement, but in the event of the engagement being so determined the manager shall pay to the artist in satisfaction of all claims of salary under this agreement a sum equal to the amount of the remuneration and salary to which the artist would have become entitled if the period of rehearsal had continued up to the day specified in the contract for the production of the play and if the run of the play had commenced on that day and continued for 14 days thereafter."

The plaintiff had left the United States and come to England hoping to acquire a reputation in London which she believed would increase the popularity she already enjoyed in America. To the knowledge of both parties it was important to her to obtain an engagement to play and actually to appear in the part of Lolotte at Daly's Theatre; and it would be very injurious—one of the defendants' witnesses admitted that it would be "a disaster"—to her reputation if, after it was publicly known that she was engaged to play the part, she was not permitted to do so. Before the plaintiff was willing to sign the above agreement she obtained a promise from the defendant White that her name should appear at the head of the cast, and up to the date of the dress rehearsal, June 11,

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her name appeared there and upon the electric light outside the theatre and elsewhere. On June 12, the day fixed for the commencement of her engagement, the defendants refused to allow the plaintiff to appear in the play either on that day or within seven days thereafter or at all.

She claimed that she had been damaged in her reputation by not being allowed to appear as announced in the advertisements, and that she had suffered serious loss in consequence of the defendants' act in refusing to allow her to appear. The play, or a revised version of it, ran for thirty-two weeks, another actress appearing in the part of Lolotte.

With regard to the claim for libel, on Thursday, July 29, 1926, the defendants wrote the following letter to the plaintiff: "Dear Miss Marbe, I have received your letter of July 26 on which I have seen Mr. White. In view of the statement you made at our first interview when you represented yourself as being well known and in great demand, it is a little difficult to reconcile these with the position which you now disclose, and which indeed is emphasized by the fact that [since] we intimated that your services would not be required for 'Yvonne,' you have not succeeded in obtaining any employment. The salary we agreed to pay was based on these representations of your position and the engagements which you intimated were open to you. It is manifest therefore that the proper course for you to become known and to win a reputation is to go on tour with our No. 1 company which has a reputation of the highest and in which from time to time positions are occupied by artistes of the highest class. We are not prepared to continue the present position and to pay you a salary of 100*l.* per week while you endeavour to establish a reputation by singing at charity performances or on the radio and we must ask you therefore to agree to accept a position in our touring company at the salary called for by your agreement and failing your immediate acceptance of this we shall stop all further payments. I must ask you for a reply to this by Friday morning. Yours faithfully, For and on behalf of George Edwardes (Daly's Theatre), Ld., Cecil Paget, General Manager."

This letter was handed to a typist in the defendants' office, who transcribed it by means of a type-writing machine. Horridge J., following *Pullman* v. *Hill* (1), held that the letter was published to the typist, but, on the authority of *Boxsius* v. *Goblet* (2), *Edmondson* v. *Birch* (3), and *Roff* v. *British and French Chemical Co.* (4), that it was published on a privileged occasion. At the close of the plaintiff's case the learned judge was asked to rule that there was no evidence of malice to go to the jury. He asked the defendants' counsel whether they proposed to call evidence, and they said they did. The learned judge then declined to rule on the question of malice until he had heard the whole case. From the evidence for the defendants it appeared that the letter of July 29 was settled by a member of the firm of solicitors who represented them; that Mr. Cecil Paget did not hold the opinion that the plaintiff had procured the engagement by means of false representations concerning her reputation, and that he was sorry his name appeared at the foot of the letter. In another letter, dated August 7 and written by the defendants' solicitors to the plaintiff's solicitors, the plaintiff was accused of declining to take the employment at a salary which would involve her in no loss; and the letter went on to say "but on the contrary she prefers to enjoy herself in London and expects to receive the full salary under the agreement without working for it." In cross-examination Mr. Cecil Paget admitted that he had no reason to believe that statement was true. Upon this the learned judge ruled that there was evidence of malice to go to the jury. He left to the jury four questions which, with the answers of the jury thereto, were as follows:—

1. Did the defendants agree, in consideration of the plaintiff entering into the agreement, to advertise her in a prominent position?—Answer: Yes.

2. What damages, if any (beyond the payment of her salary), is the plaintiff entitled to for any damage to her reputation for not being allowed to act?—Answer: Yes; 3000*l*.

(1) [1891] 1 Q. B. 524.
(2) [1894] 1 Q. B. 842.
(3) [1907] 1 K. B. 371.
(4) [1918] 2 K. B. 677.

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3. Do you find for the plaintiff or the defendants on the claim for libel ?—Answer : (*a*) Yes, defamatory. (*b*) Written with malice.

4. Damages for libel 100*l*.

Upon these findings judgment was entered for the plaintiff for 3100*l*. beyond the 2557*l*. paid into Court.

The defendants appealed.

Neilson K.C. and *Croom-Johnson K.C.* for the appellants. It may yet be argued in the House of Lords that there was no publication of the letter of July 29, 1926, containing the alleged libel; but presumably this Court would follow its former decision in *Pullman* v. *Hill* (1) and would hold that there was a publication to the appellants' typist. But if there was a publication it took place upon a privileged occasion, and the respondent failed to offer any evidence of malice. The learned judge ought therefore to have withdrawn the case from the jury and to have entered judgment for the appellants. The objection was duly taken at the trial.

[BANKES L.J. Were you content to rely on it and call no evidence ?]

The appellants had to call evidence on the other branch of the case. In these circumstances the learned judge ought to have ruled on the question of malice at the close of the respondent's case. But when the appellants' evidence was heard it was consistent equally with the absence and with the presence of malice, and even then the question ought to have been withdrawn from the jury.

With regard to the alleged breach of contract, there was no express contract that the appellants should unconditionally allow the respondent to play the part of Lolotte, whether it suited them to do so or not and even if the rehearsals showed that she was unsuited for the part. The respondent was only engaged to play "at such times and at such theatres . . . . as the manager" should "from time to time direct." The contract therefore amounted merely to a retainer at 100*l*. a week, and the appellants performed their obligation when

(1) [1891] 1 Q. B. 524.

they paid the respondent the agreed salary. A contract of employment is not prima facie a contract to find employment: *Turner* v. *Sawdon*. (1) *Fechter* v. *Montgomery* (2) is distinguishable. There the plaintiff had been offered the part, and besides the written engagement there was an oral communication between the parties from which the Court inferred that the plaintiff was to have an opportunity of acting. In *Bunning* v. *Lyric Theatre* (3) the contract showed that the plaintiff, a musical conductor, had bargained for an opportunity of appearing in public. In *Newman* v. *Gatti* (4) it was held that an actress who was engaged to understudy a part had no right to appear in the part in the absence of her principal.

The collateral agreement relied on by the respondent, namely that she should be prominently advertised, carries her case no further, for it must stand or fall with the contract of employment and could only be a contract to advertise the respondent if she played the part of Lolotte. It was therefore in no sense collateral to the main agreement but could only have been made as part of that agreement. It follows that the learned judge ought not to have admitted evidence of this so-called collateral agreement.

If there was any breach of contract by the appellants, still the verdict cannot stand, first because damages for loss of publicity are not recoverable: *Turpin* v. *Victoria Palace* (5), and secondly because even if they were the verdict is excessive: *Johnston* v. *Great Western Ry. Co.* (6)

Sir Patrick Hastings K.C. and *Richard O'Sullivan* were heard on the amount of the verdict only.

BANKES L.J. This is an appeal from the verdict of a special jury and the judgment entered thereon by Horridge J. in favour of the plaintiff. The action was brought for damages in respect of two separate causes of action, libel and breach of a contract of employment. The jury found in favour of the plaintiff on both claims and awarded 100*l.*

(1) [1901] 2 K. B. 653.
(2) (1863) 33 Beav. 22.
(3) (1894) 71 L. T. 396.
(4) (1907) 24 Times L. R. 18.
(5) [1918] 2 K. B. 539.
(6) [1904] 2 K. B. 250.

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for the libel and 3000*l.* for the breach of contract. The appeal raises a number of points. With regard to the libel it was said, first that there was no evidence of publication, and secondly that there was no evidence of malice, and that the judge at the trial ought to have so ruled; and with regard to the breach of contract it was said that he had misconstrued the contract, that there was no evidence of a collateral contract relied on by the plaintiff, that the jury were misdirected in several particulars, and that the damages awarded were excessive.

The plaintiff was a lady who had already established a reputation in America as an actress. She came to Europe hoping to acquire a reputation in a London theatre, because that would tend to enhance her prestige in America. As Daly's Theatre was thought to be particularly suitable for her purposes she was introduced to the general manager of that theatre and in the result she obtained a definite engagement to play in a definite part in a specified play. It was agreed that she should receive a salary of 100*l.* a week, which was considerably less than she had been receiving in America, and she made two stipulations: (1.) that the agreement should be signed before the rehearsals began, and (2.) that, as a condition of her taking the engagement at all, she should be advertised in a prominent and attractive manner. The agreement was signed; the collateral agreement about advertising was duly carried out; the rehearsals commenced, and all went smoothly and satisfactorily until the day of the dress rehearsal. And then she was told that she was not to play the part, because a lady who played an important part in the piece would not allow her to perform, the reason assigned being that if the plaintiff was allowed to act she would be overshadowing this lady, who could not tolerate that state of things. This announcement was made to the plaintiff with great regret by Mr. Paget, the general manager of the defendants. A correspondence followed between the defendants and the plaintiff. First the defendants took up the position that the plaintiff was under some duty towards them to take an engagement elsewhere; then she

was accused of not making any effort to obtain an engagement; and when she wrote and protested that she was doing her best to find an engagement the defendants wrote suggesting that her reputation was not what she had represented it to be, for if it was she would have found an engagement by that time. That letter was the foundation of the claim for libel. The plaintiff could obtain no suitable engagement, and in August, 1926, she brought this action. The defence was that the defendants were not bound to provide her with employment, i.e., to allow her to play the particular part for which she had been engaged, or any other part; they also suggested that she was not well qualified to play the particular part, and finally they paid into Court the whole amount of the agreed salary for the run of the play. So the defendants do not deny that they were liable for breach of contract; what they say is that the plaintiff is not entitled to any damages for the libel or for her loss of that publicity and that enhanced reputation which she would have acquired if she had been allowed to act the part. They also say that so far as concerns any promise to advertise her in a prominent position there was nothing in the shape of a contract that they should do that.

I come now to the trial of the action. Taking the libel first, it is clear that this Court is bound to hold that there was a publication of the letter of July 29, and that it was published on an occasion of qualified privilege. But Mr. Neilson for the defendants contended that at the end of the plaintiff's case there was no evidence that the defendants in publishing the letter were actuated by malice; that it was for the judge to rule at that stage whether there was evidence to go to the jury, and that if he had done that the plaintiff must have failed. That argument has been addressed to the Court on several occasions and it has been held, and I repeat now, that according to the present practice the judge has a discretion whether he will rule on the matter at the close of the plaintiff's case or whether he will defer ruling until the whole of the evidence has been called. In the latter event the defendant's counsel must then elect whether

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he will rely on his objection that there is no evidence of malice, or call evidence for the defendant at the risk of supplying evidence for the plaintiff which the jury may accept as proving malice. No doubt that puts the defendant in a difficulty where he has to meet a case of breach of contract as well as of libel, because he has to call evidence to meet the charge of having broken the contract. That is a matter which the judge takes into consideration in deciding when he will rule on the question of malice ; but we cannot interfere with the ruling on the ground that the learned judge had no right to do what he did. When Mr. Paget was called there was abundant evidence of malice, because he admitted that he did not believe the suggestion contained in the letter that the plaintiff obtained the engagement by means of misrepresentations. But the matter does not rest solely on Paget's evidence. The plaintiff's evidence in my view afforded evidence of malice, because it went to show that Paget's real reason for not allowing the plaintiff to act was inconsistent with the reason suggested in the letter, and so far from ruling that there was no evidence of malice at the end of the plaintiff's case the learned judge ought, in my opinion, if he ruled at all at that stage, to have ruled that there was such evidence.

Then with regard to the other part of the case. Much has been said about implied terms in theatrical contracts. It seems to me that contracts of employment or engagement —it matters not which word is used—fall into two classes which must be distinguished. There are well known occupations in which when a person is employed or engaged there is no implied agreement that he shall be actually given work to do. A contract of domestic service contains no implied term that the master shall give the servant work to do, or that the servant shall have a cause of action if he is not given enough work. Similarly a doctor or a solicitor may be employed or engaged for a year, but the person who employs is not bound to be ill or to become involved in litigation in order that the other party may have something to do. A retainer, or call upon the services of another, is

also an example; it does not imply an undertaking to utilize the services but merely a right to utilize them when necessary or convenient. But there is another class of contracts which is quite different and in which it is not necessary to introduce any implied term; these are contracts of employment to do a particular specified thing. For example, a man may be engaged to come and clean windows on a certain day. If when he comes he is told he is not to do the work, there is a breach of contract. The engagement of an actress to play a particular part is an instance of this latter class. In my view no question of implied obligation arises here; the obligation is express. The manager who engages an actress to play a particular part and then refuses to allow her to play it commits a breach of contract. The plaintiff in this case was engaged "to rehearse and play the part of Lolotte in the play called 'Yvonne.'" In the absence of some custom to vary the plain meaning of those words the Court can only give them their plain meaning. The question begins and ends there. There was a breach of that contract. It was said that the plaintiff was not allowed to play the part because she was not suited to the part. If that suggestion had been proved it might have raised a question; but it was not proved and so the question does not arise. Then it was said that the engagement was to play the part "at such times and at such theatres . . . . as the manager shall from time to time direct"; and that is true, but those words do not entitle the manager to say what he did say—namely, that the plaintiff should not play the part at any time or at any place. In short there was a clear breach of contract.

Then what is the measure of damages? The learned judge is said to have misdirected the jury on this part of the case. Now there were special circumstances, well known to the defendants, attending the making of this contract, among them a collateral agreement which was of particular importance to the plaintiff. Upon the subject of collateral agreements I should like to refer to *Newman* v. *Gatti* (1), where the managers of a theatre engaged an actress for the

(1) 24 Times L. R. 18.

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run of a certain play at the theatre to understudy the principal actress at a certain salary. The principal lady being unable to play, the understudy claimed the right to play her part, which the managers refused. Evidence was given on behalf of the defendants that an understudy was not entitled as of right to play the principal's part if the latter was absent. The plaintiff alleged that there was a collateral contract that she should play the part in the absence of the principal lady. Upon this point the judgment of Vaughan Williams L.J. is reported in these words (1): "It was said that there was a collateral contract, and that the question whether there was or was not such a contract was a question for the jury. He entirely agreed that that would be so, if there was any evidence of such a contract. In his opinion there was no evidence of any such contract. Sometimes one had a collateral contract, the consideration for which was the entering into the principal contract, as, for instance, when one party said that he would not enter into the contract unless the other party made a collateral contract with him." In that case the defendants had given evidence that in the theatrical profession the word "understudy" had a particular meaning; and in the result Vaughan Williams L.J. was of opinion that "once the meaning of the word 'understudy' was made clear, the construction of the contract was for the Court; and when they construed it it became plain that the right which the plaintiff claimed in the action—namely, to play the part if Miss May was absent, was in no way referred to or contained in the contract." In the present case there is no evidence of any custom in the profession or any customary meaning of the language of the contract, while on the other hand it is clear that there was a collateral agreement that the plaintiff should be prominently advertised and that she only entered into the principal contract on condition that the defendants would comply with her requirements in this respect. In my opinion the evidence of this collateral agreement was properly admitted in accordance with the authorities which permit evidence to be given of

(1) 24 Times L. R. 20.

a verbal agreement collateral to a principal contract in writing, and that there was no misdirection by the learned judge upon this point.

Then how far does the existence of this collateral contract affect the damages? In my opinion it is sufficiently established that where there has been a breach of a contract to employ an actress, whose reputation depends on the continued and successful practice of her art, and where the engagement is accompanied by promises of widespread publicity and advertisement which will probably lead to future opportunities following on successful performance, the Court recognizes that the damages for that breach may properly include such a sum as a jury may award to compensate the plaintiff for the loss of the reputation which would have been acquired, or damage to reputation already acquired, or, to use another expression, for loss of publicity.

The next matter to be considered is the amount awarded by the jury. 3000*l.* is a large sum. I have felt some doubt whether it does not include something in the way of punitive damages. If I was convinced that it did, I should feel bound to say that the verdict could not stand, because the jury would then have taken into account matters not properly within their cognizance in view of the issue before them on this part of the case—namely, what was the monetary loss sustained by the plaintiff through not being allowed to appear in public, and perhaps to achieve a public success, in this part? Was there before the jury material on which they could properly arrive at that large sum as the measure of that loss? Eliminating all matters of prejudice and indignation at the conduct of the defendants, it is to be observed that this plaintiff, who had established a reputation in America, had failed to obtain a suitable engagement within three months after the play had ceased to run. The defendants could not deny that the events which had happened would prejudice her chance of obtaining a suitable engagement. The jury might properly estimate how much longer the effects of the defendants' conduct were likely to last, and might decide that the mere salary was not

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adequate compensation; and taking into consideration the large salary the plaintiff was earning I cannot say that the amount they have awarded was so large as to show that it must include matters which ought not to have been taken into account. For these reasons I think the appeal must be dismissed.

ATKIN L.J. I am of the same opinion. To deal first with the libel, upon the first point raised by the defendants —namely, that there was no evidence of malice, it is only necessary to point out that the defendants' general manager in his evidence made two admissions: first that the letter of July 29, 1926, meant that it was difficult to believe the representations the plaintiff had made concerning her reputation, and secondly that he was quite sure she had made no false representations, and that if the letter meant that she had made misrepresentations, that was untrue. Therefore there was evidence that the defendants' servant published defamatory statements in that letter without an honest belief that they were true. That is evidence of malice, and in my view the learned judge's direction to the jury was not sufficiently favourable to the plaintiff.

The other cause of action raises a very important question, whether an actress, who has been engaged to play a particular part, is entitled to damages beyond the mere salary named as her remuneration in the contract of engagement. Contracts of employment are not all to be referred to one class. In *Turner* v. *Sawdon* (1) the plaintiff was engaged by the defendant as a representative salesman to solicit orders for their goods. He complained that he was not allowed to represent them and claimed damages beyond his agreed salary. But it was held that there was no promise to find continuous employment of the kind mentioned in the contract, or any employment, and that all the defendants had done was to engage the plaintiff to join their staff without any obligation to provide him with work. The Court seem to have regarded his position as analogous to that of a domestic

(1) [1901] 2 K. B. 653.

servant, in whose case it would be contrary to the intention of the parties that the master should be bound to provide work for the servant to do. But, as pointed out by Stirling L.J., there is another class of cases, where the master may be under an implied obligation to give actual work to be done by the person employed, and so afford him an opportunity of displaying his abilities, as in the case of theatrical engagements. If the contract is one which includes an obligation to give work, for breach of that obligation damages may be recovered beyond the amount agreed for the employee's salary. In *Fechter* v. *Montgomery* (1) the plaintiff had engaged the defendant by a letter written on the plaintiff's behalf in these terms : "I am directed by Mr. Fechter to offer you an engagement at the Lyceum theatre for two years, commencing January 1, 1863, at a salary of 7*l.* per week for the first, 10*l.* per week for the second year; it being thoroughly understood that no advantage will be taken of the confidence you have reposed in Mr. Fechter." Some months went by and Mr. Montgomery was not given a part. Being greatly dissatisfied he accepted an engagement to act at another theatre, whereupon Fechter claimed an injunction to restrain him from acting elsewhere than at the Lyceum theatre, contending, as the appellants do in the present case, that so long as the stipulated salary was regularly paid there was no obligation on the part of the plaintiff to avail himself of the defendant's services. But Sir John Romilly M.R. held that the proper inference to be drawn from the correspondence, and from a conversation which took place before the date of the letter mentioned above, was that Fechter had agreed to do something more than merely pay the stipulated salary. The Master of the Rolls said (2) : "I am of opinion that it was an agreement entered into by Mr. Fechter to employ Mr. Montgomery, during a reasonable time, to act at this theatre, and that it was an agreement on the other side that he, Mr. Montgomery, should not perform elsewhere without the consent of Mr. Fechter; that there was a mutuality in the agreement entered into

(1) 33 Beav. 22. (2) 33 Beav. 26.

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on both sides, on the one side that he should have an opportunity of displaying what his abilities and talents were before a London audience, and on the other side, that he should not act elsewhere, unless with the permission of the plaintiff." So, being of opinion that the plaintiff had himself broken the agreement the Master of the Rolls refused the injunction. Another important case is *Grimston* v. *Cuningham*. (1) There the defendant entered into an agreement with the plaintiff, who was professionally known as W. H. Kendal, in these terms: "And furthermore I agree to engage with Mr. W. H. Kendal to act and to understudy as a member of his company, on tour in the United States of America and Canada, for a period of 25 weeks, or longer if required, but not to exceed 40 weeks, commencing on or about October 9, 1893, at a weekly salary of 10*l*." The plaintiff's company went to America and in October, 1893, produced "The Second Mrs. Tanqueray," in which the defendant was not given a part. He made up his mind that he was not going to be given a part, and he threw up his engagement, sailed for England, and accepted a part in a London theatre. The plaintiff brought an action to restrain him from acting without the plaintiff's permission, and the injunction was granted on the ground that the defendant had left the company before a reasonable time had elapsed to enable the Court to judge whether the plaintiff intended to perform his part of the contract. Wills J., referring to *Fechter* v. *Montgomery* (2), said (3): "In that case the defendant was engaged to act at the Lyceum theatre for a period of two years, and the agreement was construed by the Court to mean on the one side that the defendant should have an opportunity of displaying what his abilities and talents were before a London audience, and on the other side that he would not act elsewhere without the permission of the plaintiff. Five months after the agreement had been entered into no part had been allotted to the defendant, and for this reason the Master of the Rolls came to the conclusion that the

(1) [1894] 1 Q. B. 125. (2) 33 Beav. 22.
(3) [1894] 1 Q. B. 130, 131.

plaintiff's own engagement had been broken, and therefore he could not enforce the negative stipulation on the part of the defendant. In the present case, what is the obligation on the part of the plaintiff contained in the contract? The plaintiff engages the defendant to act and understudy; but that does not mean that he undertakes to provide a part for him in every play that may be produced. That was not the ground on which the decision in *Fechter* v. *Montgomery* (1) proceeded. In that case the plaintiff was bound to give the defendant a reasonable opportunity of acting, and failed to do so. But a manager cannot be expected to give every actor whom he engages a part in every play which may be produced, and generally to attempt to do so would not be for the benefit of the actor. All that the defendant can be entitled to is to have a reasonable opportunity of acting and understudying, having regard to all the circumstances of the case." These are two cases in which the actor or other artist was engaged in general terms without mention of any particular part, in which however it has been held that he has a right to a reasonable opportunity of exercising his art though the time and circumstances may be in the discretion of the manager of the theatre. In *Bunning* v. *Lyric Theatre, Ld.* (2) the contract was in these terms: "The said Herbert Bunning agrees to act as musical director of the orchestra for London, Brighton, or Crystal Palace, in consideration of the management paying him a weekly salary" of 8*l.*, to be increased to 10*l.* and afterwards to 12*l.*, making a total engagement for three years. "No salary shall be paid for any part of the time of this agreement during which the theatre is closed, the management having the right to close the theatre at any time they think fit. . . . . Name to be announced in Standard and Telegraph, and on bills and programmes." The plaintiff claimed damages because he had not been permitted to conduct at the theatre nor been called upon to perform the duties of his office, though his salary had been duly paid. Stirling J. in giving judgment said (3): "It is expressly stipulated that the plaintiff's

(1) 33 Beav. 32. (2) 71 L. T. 396. (3) 71 L. T. 397, 398.

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name shall appear as musical director, and what is intended is, that such a state of things shall exist that the defendants shall be in the position truly to make such an announcement, or, in other words, that they shall employ him in that capacity"; and judgment was given for the plaintiff for 52*l.* 10*s.*, although his salary had been paid. Thus there is a current of authority for holding that, where managers agree that a person shall play a part, that is a substantial term of the contract which must be fulfilled or for the breach of which damages over and above the agreed salary may be recovered. The only breach in the chain is the judgment of McCardie J. in *Turpin* v. *Victoria Palace.* (1) There the plaintiff and the defendants had entered into a contract in a standard form. The material words are not set out verbatim in the report, but it seems that the defendants engaged the plaintiff, and the plaintiff accepted the engagement and agreed to perform at the Victoria Palace at two performances every evening for the periods stated in the agreement during the four years therein mentioned at a salary of 25*l.* a week. The plaintiff was not for certain periods to perform at any place of amusement within a specified radius; if she should fail, except through illness or accident, to perform at any performance, she was to pay a sum as liquidated damages; she was to send the defendants particulars of all matters for programmes, billing and advertisements, and the words of all songs to be used during the engagement; the management had power to prohibit any part of the performance which they considered unsuitable or displeasing to the audience, and also the right to determine the position of the plaintiff's name, the size and nature of the type, and the description of the various items in the programmes, bills, and advertisements. The learned judge said (2): "It is essential to inquire whether the present contract imposes on the defendants any obligation to allow the plaintiff to appear at their music hall on the dates fixed by the agreement," and he came to the conclusion that it

(1) [1918] 2 K. B. 539. (2) [1918] 2 K. B. 547.

did not. It may be that the agreement contained some special term which does not appear in the report. If that is not so, then as at present advised I am not prepared to agree with this conclusion of the learned judge. I should have thought the agreement would impose an obligation on the defendants to allow the plaintiff to perform, even if it had contained no clause restraining her from performing elsewhere; but with that clause it would, as it seems to me, have no meaning for the plaintiff unless it imposed that obligation upon the defendants. In *Newman* v. *Gatti* (1) the plaintiff was engaged for the run of a play which was to follow a named play at a named theatre. The engagement was to understudy a named actress. The agreement was performed if the plaintiff was allowed to understudy. The only question was whether a person who was understudying another had a right to play the part in the absence of the other. That was a matter of theatrical usage upon which evidence was given at the trial, and the evidence was all one way, that there was no such right.

Does the present case come within that class of cases where the managers of a theatre agree that an actor or actress shall play in a part? Nothing could be plainer than the answer. By the terms of the contract "The manager engages the artist to rehearse and play the part of Lolotte in the play called 'Yvonne' . . . . and the artist accepts the said engagement upon the terms and conditions herein appearing. . . . . The engagement shall commence on June 12, 1926." Her weekly salary commenced on the same day. That is a promise that the plaintiff should play that part. She might have refused to play any other part. What might have happened if she had proved incompetent to play it I do not decide. The question does not arise. Here was a plain obligation to allow the plaintiff to play the part of Lolotte, and it was broken and there is no reason why for a breach of that contract in not allowing her to play that part she should not be entitled to substantial damages. Moreover there has clearly been a breach of the contract

(1) 24 Times L. R. 18.

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to advertise the plaintiff in a prominent place, and on the authority of *Bunning's* case (1) the parties must have intended that such a state of things should exist as to enable the defendants truly to make the announcement contained in the advertisements, or, in other words, that she should play the part.

I had some doubt about the amount of damages awarded by the jury; but it must be remembered that the plaintiff was an American actress with a high reputation in her own country wishing to acquire a reputation in England also; that she has lost this opportunity by the act of the defendants, who admit that to be advertised as about to appear and to be prevented at the last moment from appearing would be disastrous to the reputation she wished to acquire, and her existing reputation may also be considered. In these circumstances it cannot be said that the damages are beyond what a jury acting as reasonable persons might award. For these reasons the appeal must in my opinion be dismissed.

LAWRENCE L.J. The solution of the main question in this case depends upon the true meaning of the contract between the parties. The authorities which have been cited are concerned with the rights of parties to contracts differing both in form and in substance from the contract here, and therefore are not of much assistance. Contracts of employment fall under two categories; first those in which the only obligation imposed upon the employer is the payment of the agreed remuneration, and no duty is cast upon the employer to give active occupation—this no doubt is the more usual form of contract; and secondly those in which the employer engages not only to pay the agreed remuneration but also to afford to the employee an opportunity of doing the work for which he is engaged. Whether a given contract falls within the first or second category depends primarily on the express words of the contract, but may also depend upon the character of the employment, and possibly upon the amount and nature of the remuneration. The contract

(1) 71 L. T. 396.

in the present case is between a theatrical manager and an actress, whereby the manager agrees to engage the actress to rehearse and play a particular part in a named play; and the commencement and duration of the employment are definitely fixed and cover the period of rehearsal and the run of the play. The agreed remuneration is 100*l.* a week from the commencement of the run of the play. The manager also entered into a collateral agreement with the plaintiff whereby it was agreed that in consideration of the plaintiff entering into the principal contract her name would be advertised in a prominent position.

The word "engage" is a flexible term; in contracts of employment it means "agree to employ." The expressions "engage" or "agree to employ" in such contracts may mean simply that the employer agrees to retain the services of the employee, or they may mean that he agrees to afford the employee an opportunity of doing the work for which he is engaged. Having regard to the fact that it is of vital importance to an actress that she should appear before the public as much as possible and that therefore her employment should be real, and having regard to the definite character of the engagement in this case, I have come to the conclusion that on the true construction of the contract the defendants agreed to afford to the plaintiff the opportunity of playing the named part if the play were produced, and that the contract was not merely that upon payment of 100*l.* a week during the run of the play the defendants were to be entitled to call or not to call upon the services of the plaintiff according to their will and pleasure. Mr. Neilson contended that the words "at such times and at such theatres . . . . as the manager shall from time to time direct" in clause 1 of the agreement operated to give the manager an option to say whether he would employ the plaintiff or not, no matter whether the run of the play had commenced or not. In my opinion that argument is ill founded. Read with the rest of the contract, those words mean that the manager shall have the direction and control of the times and places at which the play shall be produced, but that is in entire

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consonance and accord with a binding obligation to employ the plaintiff. The manager may direct rehearsals to be held at various theatres and if the play is being acted at two theatres he may say at which theatre she shall act; but he has no right to say she shall not act at all. To give the words that meaning would make them inconsistent with the primary obligation of the manager to employ the actress. If that be the true construction of the contract the obligation to give employment is not merely an implied but an express obligation, and it follows that there are two separate engagements on the part of the employers, one to pay the agreed salary and the other to afford the plaintiff the opportunity of acting the part. There has been no breach of the agreement to pay the salary, but there has been a breach of the agreement to employ. In my opinion there has also been a breach of the collateral agreement; but whether that be so or not, the jury were entitled to award damages for the substantial breach of the principal contract. The verdict is large in amount, but after considering all the facts I cannot say they are so large as to lead the Court to the conclusion that the jury were misled by the eloquence of counsel or otherwise into assessing the damages upon a wrong basis.

With regard to the libel I agree that the learned judge exercised a wise discretion in declining to rule on the question of malice until he had heard the defendants' case. That case when heard in my judgment disclosed evidence of malice to go to the jury. I agree therefore that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Speechly, Mumford & Craig.*
Solicitors for respondent: *Deacon & Co.*

W. H. G.

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Jan. 11, 12.

Ex parte CARMICHAEL. (1)

Workmen's Compensation—Post Office Employee—Telegraphists' Cramp—Claim for Compensation—Certificate of Substitute for certifying Surgeon—Chief Medical Officer of the Post Office—Certiorari to quash—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-s.* 1 (*i.*), (*iii.*), (*f*), *Schedule III., and s.* 44, *sub-s.* 3—*Order of Secretary of State, dated February* 26, 1918 (*St. R. & O., No.* 287), *para.* 5—*Certificate—Judicial Act—Certiorari.*

By the effect of s. 1, sub-s. 1 (i.), of the Workmen's Compensation Act, 1925, and an Order extending its provisions to include telegraphists' cramp, a Post Office workman obtaining the certificate of the certifying surgeon that he is suffering from that complaint and is thereby disabled is entitled to compensation. By s. 44, sub-s. 3, a medical practitioner appointed by the Secretary of State is given the powers and duties of a certifying surgeon. An Order made by the Secretary of State in pursuance of that sub-section provided that so far as regards Post Office employees the Post Office medical officer "under whose charge the workman is placed shall, if authorized to act," be substituted for the certifying surgeon in cases of telegraphists' cramp. It was the practice of the Post Office to refer all cases of telegraphists' cramp to the Chief Medical Officer of the Post Office, and this reference was relied on as constituting him the substitute for the certifying surgeon under the above sub-section and Order.

The applicant, a telegraphist, was on the capitation list of the local Post Office medical officer, but in fact never consulted him. On her claiming compensation for telegraphists' cramp the case was referred to the Chief Medical Officer in accordance with the usual practice. He certified that she was not suffering from telegraphists' cramp:—

Held, that as the Chief Medical Officer was not the Post Office medical officer under whose care the applicant was placed within the meaning of the above Order, he could not be substituted for the certifying surgeon, and that his certificate must be quashed.

Held, further, that the giving of the certificate was of the nature of a judicial act, and that the certificate was therefore a proper object of proceedings by way of certiorari.

RULE NISI for certiorari to quash a certificate.

The applicant, Mrs. Ethel Carmichael, was a telegraphist employed by the Post Office at Great Grimsby, in the county of Lincoln. She was on the capitation list of Dr. S. W. Swindells, the Post Office medical officer at Great Grimsby,

(1) Reported by order of the Council of Law Reporting.

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and was entitled to free attendance by him whenever she required it, but in fact she had been accustomed to consult her own medical advisers. From the year 1923, and during the years 1924, 1925 and 1926, she had complained of suffering from great fatigue, discomfort and pain as the result of performing the duties of her employment, and she was advised by her own doctors that she was suffering from telegraphists' cramp. In consequence of her illness she resigned her employment on March 26, 1926.

By the effect of s. 43, sub-s. 1, and the Third Schedule to the Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), as extended by the Order of the Secretary of State dated February 26, 1918 (St. R. & O., No. 287), to include telegraphists' cramp, if the certifying surgeon for the district certified that a workman was suffering from telegraphists' cramp he would be entitled to compensation.

By s. 44, sub-s. 3, a medical practitioner appointed by the Secretary of State for the purpose shall have the powers and duties of a certifying surgeon. By the above Order dated February 26, 1918, para. 5, the Secretary of State provided with respect to telegraphists' cramp: "So far as regards a workman employed by the Postmaster-General, the Post Office medical officer under whose charge the workman is placed shall, if authorized to act . . . . be substituted for the certifying surgeon."

It appeared by the affidavit of the Chief Medical Officer of the Post Office, Colonel H. V. Prynne, that he had made a special study of telegraphists' cramp, and that it was the invariable practice of the Postmaster-General to refer these cases to him for certification, and this reference was relied on as constituting his authority to act as substitute for the certifying surgeon under the above para. 5 of the Order of February 26, 1918. The applicant on August 19, 1926, applied to the Postmaster-General for a certificate of the certifying surgeon that she was suffering from telegraphists' cramp, and the case was referred to the said Chief Medical Officer, Colonel Prynne, purporting to act as the appointed substitute for the certifying surgeon under the said para. 5.

Colonel Prynne by a certificate dated September 25, 1926, certified that the applicant was not suffering from telegraphists' cramp.

The applicant then obtained this rule on the ground that Colonel Prynne was not the Post Office medical officer under whose charge the applicant was placed within para. 5 of the above Order, and therefore could not be the medical practitioner appointed by the Secretary of State under s. 44, sub-s. 3, of the Act, and consequently had no jurisdiction to issue the said certificate.

W. Shakespeare showed cause.
Horton-Smith in support.

LORD HEWART C.J. This is an order nisi for a writ of certiorari directed to the Postmaster-General to remove into this Court a certificate purporting to be made and issued by one Colonel H. V. Prynne, and dated September 25, 1926, whereby it was certified that one Ethel Carmichael was not suffering from the disease known as telegraphists' cramp.

The grounds upon which the rule was granted were as follows: "That the said Colonel H. V. Prynne was not the Post Office medical officer under whose charge the workman was or ever had been placed, and therefore could not be authorized by the Postmaster-General to act for the purposes of ss. 43 and 44 of the Workmen's Compensation Act, 1925, and could not be substituted for the certifying surgeon, and therefore had no jurisdiction to act for the purposes of the said sections, and accordingly had no jurisdiction to issue the said or any certificate thereunder."

The matter has taken a considerable time in argument, but the point of it can, I think, be quite shortly stated. Under the provisions of the Workmen's Compensation Act, 1925, it is provided by s. 44, sub-s. 3: "In such cases"—that is, cases referred to in the two previous sub-sections under "Industrial Diseases"—"and subject to such conditions as the Secretary of State may direct, a medical practitioner appointed by the Secretary of State for the purpose shall

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have the powers and duties of a certifying surgeon under the foregoing provisions of this part of this Act, and those provisions shall be construed accordingly." In pursuance of the power so given the Secretary of State in February, 1918, made an order which, so far as is relevant to the present matter, contained this paragraph, numbered 5 : "In the application of the provisions of the said section to telegraphists' cramp so far as regards a workman employed by the Postmaster-General, the Post Office medical officer under whose charge the workman is placed shall, if authorized to act for the purposes of the said section by the Postmaster-General, be substituted for the certifying surgeon." The topic dealt with in that paragraph is obviously a topic of the greatest possible importance to the workman concerned. In the ordinary case under the Workmen's Compensation Acts, the workman, by evidence, proves the happening of an accident arising out of and in the course of his employment, and proves injury ; but in this particular matter of industrial diseases the first step, and it is a condition precedent to any right to recover compensation, is to obtain the certificate of a duly certifying surgeon. The statute, notwithstanding these orders, contemplates, and quite naturally contemplates, that the certifying surgeon shall be a totally independent person. The taxpayer's money which is to be paid in compensation is to be controlled in this respect, not by a departmental official, but by a perfectly independent certifying surgeon, unless the steps are taken which this paragraph under this order indicates. What are those steps ? The Post Office medical officer may be substituted for the certifying surgeon if, and only if, two conditions are fulfilled : (1.) He is the medical officer under whose charge the workman is placed, and (2.) he is authorized to act for the purposes of this part of the Act by the Postmaster-General.

In the present case Mrs. Carmichael had been for a long time employed as a telegraphist. She had been employed at most of the material time at Grimsby, for part of the time in Hull ; and although under the system adopted by the Post Office every Post Office worker, apparently, is on the

capitation list of some medical adviser or other, whose services may be obtained by the Post Office worker without the payment of fees, Mrs. Carmichael for some reason did not consult the medical officer upon whose capitation list she was, but preferred the services of her own private medical practitioner. But she was upon a capitation list, and there was a person who, wherever she was, whether at Grimsby or elsewhere, stood to her in the relation of the local medical officer to a Post Office servant. A time came when she complained that she was suffering from telegraphists' cramp, and thereupon, in the circumstances set out in Colonel Prynne's affidavit, he made an examination; he came to the conclusion that she was not suffering from telegraphists' cramp, and in the certificate which is here complained of he stated that opinion.

The first question is: Was Colonel Prynne the Post Office medical officer under whose charge Mrs. Carmichael had been placed? Colonel Prynne has sworn a long affidavit, in which he sets out with the greatest clearness the steps which he took in the matter. It is quite clear that when a certain stage was reached he did play the part of a consultant, but I am not in the smallest degree satisfied that he was at any time the Post Office medical officer under whose charge Mrs. Carmichael was placed. Nor am I in the smallest degree satisfied that he was authorized to act for the purpose of the section by the Postmaster-General. When the question arose the solicitor to Mrs. Carmichael very pointedly, and in repeated letters, inquired as to Colonel Prynne's authority, and at length, on October 7, 1926, the solicitor to the Post Office wrote saying this: "Colonel Prynne's authority to act in this case rests on his position as Chief Medical Officer, as explained in my letter of September 25, and the fact that the case was referred to him. There is no specific document of which I could send you a copy." In other words, Colonel Prynne was the Chief Medical Officer: he had some special knowledge of telegraphists' cramp, and the case was referred to him. But that is a totally different thing from authorizing him to act for the purposes of this section. In my opinion, on the true construction of this part of this order, the medical

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officer referred to is the ordinary local medical officer under whose charge the workman is placed. It does not follow that the medical officer must be the person to give the certificate. Ordinarily, the person who gives the certificate will still be the certifying surgeon; but if the Postmaster-General desired somebody within the area of the Post Office service to be substituted for the certifying surgeon, that person must be, I think, the medical officer under whose charge the workman is placed, not ad hoc, but the medical officer under whose charge in the ordinary sense the workman is placed. That view of the matter is, I think, greatly fortified when one looks at the manual for the use of Post Office medical officers. Here it is provided, I observe, in r. 6, at pp. 2 and 3: "The duties of a Post Office medical officer are briefly as follows . . . . (9.) To act as certifying surgeon under section 8 of the Workmen's Compensation Act, 1906, so far as regards Post Office servants who are suffering from telegraphists' cramp. . . . ." Although r. 57, which relates to the whole subject of telegraphists' cramp, has been amended by successive additions, including the rather interesting addition that in cases of doubt the Chief Medical Officer should be consulted and the case should not be referred to a specialist or consultant not connected with the Post Office, the rule nevertheless retains its original provision that when all the various steps have been taken the medical officer will then be asked to give a certificate of disablement in the form prescribed by the Act, the form being supplied by the Secretary as required, with any necessary instructions.

In those circumstances I am satisfied, first, that Colonel Prynne was not the Post Office medical officer under whose charge Mrs. Carmichael was placed, and, secondly, that he was not authorized to act, for the purposes of this part of the statute, by the Postmaster-General. He therefore could not be substituted for the certifying surgeon. It follows that the certificate which he has put his name to is so much waste paper.

There was a moment in this case when it was argued that the document was of such a kind as not to be proper for the

writ of certiorari. But I am satisfied, when I look at the part which a certificate of this nature must play in the making of any claim for compensation by a Post Office worker suffering from telegraphists' cramp, that the certificate of the certifying surgeon is of the nature of a judicial act, and is a fit subject for certiorari. I think, therefore, that the position that Mrs. Carmichael is in is that she has never received or been given the opportunity of receiving a certificate from the only surgeon who could lawfully give a certificate. But it is said that she is not in the least damaged by that fact, if fact it be, for the reason that the statute provides for an appeal, and it is quite true when one looks at s. 43, sub-s. 1 (*f*), of the Workmen's Compensation Act, 1925, that in the cases with which that section is dealing the machinery of appeal is provided. The words are: "If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final, and the medical referee when deciding the matter shall also certify as to the condition of the workman at the time when he is examined by him, and such certificate by the medical referee shall be conclusive."

The argument which has been urged against this rule on this point is that even though it be assumed that Colonel Prynne's so-called certificate is a mere nothing, nevertheless Mrs. Carmichael is not damnified, because she can appeal to the medical referee as if there had been a refusal to give a certificate. I do not think that is the true view. This section, in my opinion, assumes that one of two things has happened: either that there has been a refusal to give a certificate, in which case the medical referee starts with a clean sheet, or that if there has been a certificate granted it has been a certificate granted by some one who was authorized to grant it. I do not think that it was contemplated at all that the judgment of the medical referee should in the smallest degree be fettered or influenced by a certificate given by

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a wholly unauthorized person, and I do not think that Mrs. Carmichael would be in the same position before the medical referee as that in which she would have been if there had been a refusal on the part of the proper officer to give her any certificate at all. This certificate, made as it is, if it is not correct, may very well have a misleading effect. I do not think, therefore, that the argument that the beneficial remedy of appeal is open is at all fatal to the applicant for this rule.

Some further points were taken, but I do not think it is necessary to take up time by referring to them. Certainly I shall not express any opinion upon the powers which this Act confers or the particular mode in which they are conferred. Those are topics not for this Court but for other persons. But wide as these powers are, autocratic as the exercise of them may be, I do not think that they open the door to the particular piece of autocracy with which we are in this case concerned. I think, therefore, that this rule ought to be made absolute, and that this pretended certificate ought to be quashed.

AVORY J. I do not differ from the view that this certificate, being a condition precedent to the right of the workman to claim compensation, may be a proper subject for a writ of certiorari, but I have entertained considerable doubt in this case whether the applicant here was not a person under the charge of the Chief Medical Officer of the Post Office within the meaning of para. No. 5 which has been quoted. In view of the letter of October 7, 1926, which refers back to the letter of September 25, 1926, I am not prepared to differ from the view which my Lord has expressed, that there is not here sufficient to show that she ever was under the charge of the Chief Medical Officer within the meaning of that regulation. The letter of September 25, 1926, states that the Chief Medical Officer is authorized to act for the purpose of the said section by the Postmaster-General. I am inclined to think that it is established, that he was authorized to act for the purpose by the Postmaster-General. But it goes on : " He is specially

charged with all cases of alleged telegraphists' cramp, and he is therefore normally the proper person to fulfil the functions of certifying surgeons." I think there is a fallacy there in saying that because he is charged with all cases of alleged telegraphists' cramp he is therefore the proper person to fulfil the functions of certifying surgeon. On the whole, I do not differ from the view that the applicant was not in the circumstances under the charge of the chief medical officer, and consequently that he had no authority to give the certificate which he did give in this particular case.

I have also entertained considerable doubt whether any practical advantage is to be gained by the applicant in this case if this rule is made absolute, in view of the provisions as to appeal in s. 43, sub-s. 1 (*f*), of the Workmen's Compensation Act, 1925. I have, throughout the argument, certainly entertained the view that the section gives the applicant all the relief which she can require, and that she might under that appeal section have the matter determined by the medical referee, whose decision would be final as to whether she is in fact suffering from this disease. But even if that remedy is open to her, it is undoubtedly good law that if the application for a certiorari is made by a party aggrieved, then it ought to be granted ex debito justitiae, and the Court has not the general discretion which it would have when the application is made by one of the public who is not personally concerned. That was decided long ago in the case of *Reg.* v. *Surrey Justices* (1), and on that principle, even although she has the remedy by appeal in this case, I am prepared to agree that the certiorari should go, seeing that the application is being made by the applicant as the party aggrieved.

SALTER J. I agree that this rule should be made absolute. Where a workman has contracted a scheduled disease and is thereby disabled, and the disease is due to the employment, he is entitled to compensation as though he had met with an accident arising out of and in the course of his employment; but only if he can obtain from the proper medical officer a

(1) (1870) L. R. 5 Q. B. 466.

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certificate of two matters: that he has contracted the disease, and that he is thereby disabled. That is the first essential step to obtaining compensation, and if he can obtain that certificate, then prima facie, and subject to appeal, he is entitled to compensation. I agree with the other members of the Court that Colonel Prynne was not the Post Office medical officer under whose charge the workman was placed.

I do not think that I can derive very much assistance from a study of the manual. It shows how the Post Office authorities read these words. So far as it goes, it appears to support the view that this Court is taking. The normal certifying officer is the certifying surgeon under the Factories Acts. In the case of telegraphists' cramp, when contracted by postal servants, there is a right to substitute a Post Office medical officer for the certifying surgeon. For that right there are two conditions: the person appointed must be the Post Office medical officer under whose charge the workman is placed, and he must be authorized to act under the statute by the Postmaster-General. The mere fact that he is the medical officer under whose charge the workman is placed does not entitle him to certify, nor can the Postmaster-General appoint in lieu of the certifying surgeon any Post Office medical officer except the medical officer under whose charge the workman is placed.

Having regard to a letter of October 7, 1926, I share my Lord's doubts as to whether Colonel Prynne ever was in fact authorized to act; but whether he was or not, I am quite clear that he never was the medical officer under whose charge Mrs. Carmichael was placed. The certificate, therefore, in my view, is invalid, and I agree with my Lord and Avory J. that it is a judicial decision, to which a proceeding by way of certiorari would apply. Prima facie, therefore, it ought to be set aside.

The point about which I have entertained doubt is the remaining one, about the question of appeal. The Act provides by s. 43, sub-s. 1 (*f*): "If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement" there

shall be an appeal to the medical referee, whose decision shall be final. I think the words " or other surgeon " refer to a surgeon substituted under this order, or to a surgeon who may be substituted under s. 44, sub-s. 3, of the Workmen's Compensation Act, 1925. But I take it that the paragraph to which I have referred, s. 43, sub-s. 1 (*f*), of the Act of 1925, assumes that there has been a grant or a refusal of a certificate by an officer authorized by law to grant or to refuse. On appeal to the medical referee, the medical correctness of the grant or refusal can be challenged, but its validity cannot be. The medical referee could not entertain the question whether the officer who purported to certify or refuse to certify was qualified by law to do so. If Mrs. Carmichael were to succeed in the appeal which she has instituted, and the medical referee were to differ from the diagnosis of Colonel Prynne, I have very little doubt that the Postmaster-General would pay, although I have a good deal of doubt whether he would be legally bound to pay. But if the medical referee should agree with Colonel Prynne, then the plaintiff's claim would be finally defeated; and, in my opinion, that would not be a satisfactory result, because, in my view, she never has become a certified claimant and never has taken the first step necessary to entitle her to compensation. If she were now to go to the proper medical officer and ask for a certificate, I think her position might be gravely compromised, and his position rendered difficult by the existence of this embarrassing certificate.

I agree, for the reasons given, that the certificate should be quashed.

Rule absolute.

Solicitor showing cause: *The Solicitor to the Post Office.*
Solicitors for the rule: *Simpson, Palmer & Winder.*

W. L. L. B.

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THE KING *v.* WOOD.

Ex parte ANDERSON.

Coroner—Inquest—Coroner in retiring Room with Jury.

It is a fatal irregularity for a coroner to be present with a jury in their retiring room while they are considering their verdict. An inquisition quashed accordingly.

RULE NISI for certiorari to quash a coroner's inquisition.

On August 4, 1927, one Walter Tindall was knocked down and killed by a motor car driven by the applicant, Henry Yarborough Anderson. On August 6 and 9 an inquest was held by the coroner for the Thirsk division of the North Riding of Yorkshire. The jury returned a verdict of accidental death, but added as a rider that they thought there had been a certain amount of negligence, and desired to severely censure the applicant. The applicant then obtained this rule. The grounds upon which it was claimed were (1.) that the coroner was in the jury's retiring room while they were considering their verdict, and that he took the verdict in private, and (2.) that the verdict and rider were contradictory and bad on the face of them. The first ground only was dealt with by the Court.

The facts in support of the first ground as contained in the affidavits are fully set out in the judgment of the Lord Chief Justice.

It was not suggested that the coroner had gone into the room with any purpose but to assist the jury, at their request.

Lailey for the coroner showed cause. The rider should be quashed if there was any irregularity. As there is power to quash the whole inquisition there is power to quash a part. The inquisition as a whole ought not to be quashed. The only authorities on the point are two Irish cases, *Reg.* v. *Bourchier* (1), known as the *Ballyragget Case*, and *In re the Mitchelstown Inquisition* (2), in which inquisitions were quashed

(1) (1882) 17 Ir. L. T. 34. (2) (1888) 22 L. R. Ir. 279.

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on a ground similar to that in the present case. But this case is distinguishable, because no exception is taken here to the verdict itself, but only to the rider.

A. R. Linsley for the Chief Constable, who had been served with the rule.

Wallington in support. The coroner's jury sits as a court of inquiry to ascertain if any person has been guilty of a criminal act, and if they return a verdict of manslaughter against any one that person has to stand his trial. Therefore it is against public policy that anything should be done behind closed doors. And, moreover, it is as important that justice should appear to be done as that it should be done in fact. Therefore, apart from authority, it is submitted that it was irregular for the coroner to be present in these circumstances in the jury room, and the whole inquisition should be quashed. The cases of *Reg.* v. *Bourchier* (1) and *In re the Mitchelstown Inquisition* (2) are relied on.

LORD HEWART C.J. This is a rule nisi for a writ to remove into this Court an inquisition taken before one of the coroners of Yorkshire on August 6 last upon the body of one Walter Tindall, in order that it should be quashed without further order. Various grounds are set out in the rule. It is enough to refer to the first of them—namely, that the coroner was in the jury's retiring room while they were considering their verdict, and that he took the verdict in private. With regard to the facts of the case there is no substantial dispute. According to the affidavit of Mr. Henry Stewart Anderson the following matters happened after the jury had retired to consider their verdict. "The jury had been absent for approximately twenty minutes when they sent a message asking to see the coroner. The coroner then went into the room into which the jury had retired remaining alone with them at least a quarter of an hour. The coroner then came back into the room where the inquiry was held and sitting down at the top of the table, turned to Mr. Crombie [the applicant's solicitor] and whispered certain words to

(1) 17 Ir. L. T. 34. (2) 22 L. R. Ir. 279.

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him. Mr. Crombie, who was seated next to me, whispered to me saying that the coroner had told him 'Verdict of accidental death, but they wish the driver to be censured.' The jury then returned to the room, and on being asked by the coroner whether they had agreed their verdict, the foreman answered 'Yes,' and read from a piece of paper in his hand the following words, 'We find, after carefully considering all the evidence, that Mr. Tindall was accidentally killed by being knocked down by a motor car driven by Mr. Henry Anderson, but the jury are of opinion there has been a certain amount of negligence on the part of the driver of the car, and they wish to pass a severe vote of censure on him.'"

The answer of the coroner to this is very brief. He says: "I went to the jury's retiring room at their request as alleged in the affidavit of the said Henry Stewart Anderson, and dealt with the questions upon which they sought my directions."

It is not necessary to discuss the other questions raised in the affidavits or in the argument. Speaking for myself, I confine my judgment to the ground which is so raised.

It seems to me to be clearly contrary to public policy that a coroner should go into the jury room after the jury have retired to consider their verdict, even though it be for the purpose only of answering an inquiry which the jury seek to make of him, or of giving them further directions which they request. The principle applicable was clearly stated in the Irish case of *Reg.* v. *Bourchier* (1), known as the *Ballyragget Case*, which came before a Court consisting of May C.J., Fitzgerald and Barry JJ. One allegation in that case was that during the time when the coroner's jury were deliberating the coroner and his clerk remained present. In giving judgment the Chief Justice said (1): "As to [the coroner] not interfering in the discussion when the jury were deliberating, this is no excuse. He has violated the principle to be observed in such cases; the jury should have been segregated from all the rest of the public. This is the proper

(1) 17 Ir. L. T. 34, 36.

practice, and it is no answer to the complaint to say that the coroner read the evidence to the jurors when they returned to the room." In like manner in another Irish case, *In re the Mitchelstown Inquisition* (1), the inquisition was quashed on the ground of irregularity and misconduct. In that case, after the jury had retired, the coroner, being informed that the jury had agreed, entered the room in which they had been in consultation, and took the verdict before returning into court. It was common ground that the inquisition could not be supported. The Court consisted of Morris C.J., Harrison, O'Brien and Murphy JJ. The Chief Justice in delivering the judgment of the Court said (1): "I now approach a portion of the case with considerable reluctance, because I am obliged to discuss the conduct of the coroner. I am not going to enter into a pedantic exposition of the whole line of authorities showing that an inquisition could be quashed for misconduct on the part of the judicial officer who held it. The cases are to be found in Grady and Scotland's Crown Practice. I will only refer to the *Ballyragget Case* (2). . . . . In that case it was held that the coroner being in the room with the jury before they found their verdict was an irregularity for which there was no excuse." Then, having referred to the facts, the Chief Justice went on to say: "The coroner called his apprentice into the jury room, and the apprentice swore that the coroner took no part in the deliberations of the jury, although the apprentice was not there when the coroner first went in; and the apprentice said that the finding which he wrote down was dictated to him by the coroner, and not by the jury. But the question did not depend on any groping to ascertain whether or not the coroner interfered. It was public policy that the coroner should not go into the jury room, but that the jury should declare their verdict in open court." These words, and all these words, seem to me to apply to the present case.

I forbear to enter into other matters. Especially do I refrain from making any observations upon the things which the

(1) 22 L. R. Ir. 279, 301. (2) 17 Ir. L. T. 34.

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coroner said and did. It is not suggested that when he was in the jury room he was doing anything other than helping the jury, according to their request, with their verdict. But so doing in that place and in those circumstances he was doing something which ought not to have been done. I think that the rule must be made absolute and the inquisition quashed.

AVORY J. I am of the same opinion. I think the cases cited are sufficient authority upon the point. Apart from them there seem to me to be general grounds for saying that the proceedings in this case were quite unsatisfactory and that the jury never had any proper direction as to what their duty was. I agree therefore that the inquisition should be quashed.

SALTER J. I agree. I think that the segregation of the jury while considering their verdict is an essential principle of all jury trials, and that that principle was not observed on this occasion.

Rule absolute. (1)

Solicitors showing cause: *Eland, Nettleship & Butt, for J. R. Wood, York.*

Solicitors in support: *Long & Gardiner, for Geo. Crombie & Sons, York.*

Solicitors for Chief Constable showing cause: *Lambert & Hale.*

(1) The Court ordered another inquisition before another coroner.

W. L. L. B.

Considered. SORRELL *v.* PAGET [1950] 1 K. B. 252

[IN THE COURT OF APPEAL.]

C. A. 1927 *July* 14, 15, 18, 29.

ALBEMARLE SUPPLY COMPANY, LIMITED *v.* HIND AND COMPANY.

Hire-purchase Agreement—Taxicabs—Hirer to keep in repair—Prohibition against creating Lien for Repairs—Cabs kept at Garage where Repairs executed—Garage Owner's Lien in Ignorance of Agreement—Implied Authority of Hirer—Lien not lost by Cabs plying daily for hire—Appropriation of Payments on general Account—Detinue—Lien.

B. hired three taxicabs from the plaintiffs under hire-purchase agreements which required him to keep the cabs and their equipments in good repair, and prohibited him from selling, pledging or parting with possession of the cabs without the plaintiffs' consent, and from creating a lien upon them in respect of such repairs. B. kept the cabs and two others at the garage of the defendants, who cleaned them, supplied them with tyres, grease, oil and petrol, and did all necessary repairs to and charged rent for them. At first B. paid the defendants' weekly bills in full. He then fell into arrear, but the defendants allowed him to take the cabs out daily to ply for hire on condition that the cabs continued "in pawn" and were returned to the garage each night. The defendants' weekly accounts then debited B. with the amounts in arrear brought forward; credited the amount paid by B., which was sometimes a lump sum and sometimes the exact amount of the current week's bill; and carried forward the balance. B. then fell into arrear with his hire-purchase instalments, and the plaintiffs terminated the agreements and demanded the three cabs from the defendants, who claimed a lien for 113*l.* 18*s.* 3*d.* the balance of their general account for all five cabs due from B., but they also gave the plaintiffs full details of the charges for each of their three cabs. The plaintiffs, relying on their agreements, made no tender to the defendants, but commenced this action for detinue. The defendants then sought to appropriate the total sum received from B. to items for which they had no lien against the plaintiffs, and to appropriate the balance to the plaintiffs' three cabs, leaving 94*l.* 11*s.* 1*d.* unpaid, for which they claimed a lien as against the 113*l.* 18*s.* 3*d.* originally claimed:—

Held, (1.) that a contractual limitation of authority not communicated to the repairer did not limit the implied authority derived from the hirer being allowed to possess and use the car, and that the defendants were entitled to a lien in respect of repairs executed by them.

Keene v. *Thomas* [1905] 1 K. B. 136 and *Green* v. *All Motors, Ld.* [1917] 1 K. B. 625 applied.

(2.) That the conditional agreement between B. and the defendants that the cabs might be taken out daily to ply for hire, did not prevent the repairer's lien from continuing.

(3.) That the defendants had not in the circumstances lost their lien by demanding too large a sum at first, or by basing it partly on the

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wrong ground; that their attempted appropriations were too late; and that there must be an inquiry how much of the amount of the lien they claimed represented items for repairs to the three cabs.

Order of Swift J. varied.

Per Scrutton L.J. A person claiming a lien must either claim it for a definite amount or give the owner particulars from which he himself can calculate the amount for which a lien is due. The owner must then, in the absence of express agreement, tender an amount covering the lien really existing. If he does not, unless excused, he has no answer to a claim of lien. He may be excused from tendering (*a*) if he has no knowledge, or means of knowledge, of the right amount; or (*b*) if the person claiming the lien for a wrong cause or amount makes it clear that he will not release the goods unless his full claim is satisfied, and that claim is wrongful. The fact that the claim is made for more than the right amount does not matter unless the claimant gives no particulars from which the right amount can be calculated, or makes it clear that he insists on the full amount of the right claimed.

Scarfe v. *Morgan* (1838) 4 M. & W. 270; *Dirks* v. *Richards* (1842) 4 Man. & G. 574; *Huth & Co.* v. *Lamport* (1886) 16 Q. B. D. 735; *Rumsey* v. *North Eastern Ry.* (1863) 14 C. B. (N. S.) 641, 651, 654 applied.

APPEAL from Swift J.

The plaintiff company by hire-purchase agreements dated respectively May 3, 1921, September 13, 1922, and May 5, 1923, let three taxicabs to J. Botfield; the total purchase price of each cab was 785*l*. Each agreement contained clauses that the hirer (*a*) would not sell, assign, pledge, mortgage, underlet or part with the possession of the vehicle without the consent of the plaintiff company, (*b*) would keep the taxicab and its fittings and equipments in good repair, and (*c*) would not create a lien upon it in respect of such repairs. Botfield had two other taxicabs, and he kept all five cabs at the defendants' garage. The defendants looked after them, cleaned them, supplied tyres, grease, oil and petrol for them, and did all necessary repairs to them, and charged rent for them.

Up to May, 1924, Botfield received weekly bills from the defendants which he paid in full. From that date he began to fall into arrear. The weekly accounts debited the amount in arrear brought forward; credited the amount paid, which was sometimes a lump sum and sometimes the exact amount of the current week's bill; and carried forward the balance.

In May, 1925, the plaintiffs, whose purchase instalments were in arrear to the extent of 340*l.*, gave notice terminating the hire-purchase agreements and required the three cabs to be delivered up to them.

When the plaintiffs demanded their three cabs from the defendants on May 19, 1925, the latter claimed to retain the cabs under a lien for 113*l.* 18*s.* 3*d.*, the balance of their account due to them from Botfield. The amount of 113*l.* 18*s.* 3*d.* was obtained by debiting 1221*l.* 18*s.* 10*d.*, the total charges for all five cabs, and crediting all Botfield's payments amounting to 1108*l.* 0*s.* 7*d.* The defendants gave the plaintiffs full particulars of the credit and debit items of the account, and also full details of the charges for each of the plaintiffs' three cabs; but the plaintiffs, relying upon the terms of their agreements with Botfield, made no tender in respect of the repairs done to any of their three cabs, although they had accounts which, if they had taken the trouble, would have enabled them to make an approximate tender of the amount charged for repairs to each cab.

The plaintiffs declined to pay anything, and on May 29, 1925, issued the writ in this action for detinue. In their defence the defendants claimed a lien, and on being asked for particulars they claimed a lien for 113*l.* 18*s.* 3*d.* for "repairs done and materials supplied." This amount was in fact the balance of their account due to them from Botfield for all five cabs, the account including rent, washing, oil and petrol, which would not be the subject of a repairing lien.

On June 22, 1925, an order was made for payment of the 113*l.* 18*s.* 3*d.* into Court and for their three cabs to be delivered up to the plaintiffs without prejudice to the rights of all parties. The defendants stated in their answer to interrogatories that there was money due on each cab, but that they were unable to sever the total so as to show what sum was due on each of them.

Being ordered to give further particulars of how the 113*l.* 18*s.* 3*d.* was made up the defendants did not do so in the action, but on May 12, 1927, their solicitors purported to appropriate the total sum received from Botfield from

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May 9, 1924, to items for which they had no lien against the plaintiffs, and they proceeded to appropriate the balance to the plaintiffs' three cabs leaving 94*l.* 11*s.* 1*d.* unpaid for which they now claimed a lien, as against the 113*l.* 18*s.* 3*d.* originally claimed and paid into Court.

The trial of this action was postponed until after the trial of a similar action, between the same plaintiffs and defendants, before Rowlatt J. on May 2, 1927, in which his Lordship held that the lien of a repairer attached notwithstanding the agreement between the owners and the hirer.

On June 2, 1927, Swift J., before whom this present action was tried, delivered a considered judgment in which he held, following the decision of Rowlatt J. on this point, that a lien had arisen, and that the defendants had done nothing to prevent them from exercising it; that they had lawfully asserted it; and that there must be judgment for them with costs and, subject to any application, an order that the money in Court should be paid out to them.

It appeared from the evidence in the action that there was an agreement made by the defendants with Botfield in December, 1924, that the cabs, even if permitted to leave the garage for use, should be treated as still "in pawn."

The plaintiffs appealed. The appeal was heard on July 14, 15 and 18, 1927.

Cave K.C. and *Woodgate* for appellants. Botfield had no authority so to deal with the cars as to give the defendants any lien at all: *Pennington* v. *Reliance Motor Works, Ld.* (1) The creation of the lien must rest on either express or implied authority, and there can be neither where there is an express prohibition.

In *Keene* v. *Thomas* (2) and *Green* v. *All Motors, Ld.* (3), the cars were hired out, and it was necessarily implied that the hirer should be able to get repairs executed.

Botfield was not an agent with a secret limitation of his authority. He had undertaken to have the car repaired

(1) [1923] 1 K. B. 127. (2) [1905] 1 K. B. 136.
(3) [1917] 1 K. B. 625.

and not to subject it to a lien, and he has broken his contract. The only way the defendants can retain the car for their lien is by showing that it was left there by a man who had an express or implied authority to create a lien upon it.

The defendants also cannot establish their lien, because they did not retain continuous possession of the cars. Further, there was no certain sum allowed to be due, and where a person claims to retain on a wrong ground, he loses his lien.

Moreover the method of appropriation in this case was useless, and was one to which the principle of *Cory Brothers & Co.* v. *Owners of the Mecca* (1) would not apply.

If there ever was a lien for repairs in respect of the three cabs, the defendants have in fact waived it by claiming to retain the cabs for 113*l.* on a general balance of account without making any appropriation. Part of the 113*l.* claimed was in respect of two cabs with which the plaintiffs had no concern; and the demand for it amounted to a waiver of their lien: *Dirks* v. *Richards* (2); *Scarfe* v. *Morgan* (3) where, however, two demands were made, a rightful and a wrongful one: *Jones* v. *Tarleton* (4); *Kerford* v. *Mondel.* (5)

Assuming that we are wrong on all those points, then we submit that the repairs to the three cars were mere maintenance repairs and were not executed for the purpose of improving the cabs, and therefore were not the proper subject of a lien: *Hatton* v. *Car Maintenance Co.* (6)

Serjeant Sullivan K.C. and *Martin O'Connor* for the respondents. It has been held by Rowlatt J. in an action between these same plaintiffs and defendants that the lien of a repairer attached to the plaintiffs' cabs notwithstanding the terms of these agreements. We submit that the lien which arises for work and labour done and material incorporated into the cabs is work outside the lien to which these particular agreements refer. This is a lien at common law, and is not constituted by the conduct of the parties: *Fisher* v. *Smith* (7); *Chambers* v. *Davidson.* (8) A common law lien

(1) [1897] A. C. 286.
(2) 4 Man. & G. 574.
(3) 4 M. & W. 270.
(4) (1842) 9 M. & W. 675.
(5) (1859) 28 L. J. (Ex.) 303.
(6) [1915] 1 Ch. 621.
(7) (1878) 4 App. Cas. 1.
(8) (1866) L. R. 1 P. C. 296.

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is not the result of express contract but is given by implication of law. The defendants cannot be deprived of their common law lien by a contract between the plaintiffs and Botfield: *Keene* v. *Thomas* (1), and a common law lien is good against every one if the article has come into the artificer's hands to be repaired. In an action of detinue retainer is not wrongful if any lien in fact exists. The lien was not lost by reason of the cabs being taken out for use, in face of the agreement between Botfield and the defendants.

On the evidence there has been no waiver. There is no waiver of lien by asking too much or by putting the claim on the wrong ground: *White* v. *Gainer* (2), in which no sum certain was mentioned, but the question of merger arose. A claim for a larger amount does not waive a lien for a smaller sum: *Scarfe* v. *Morgan* (3); although a lien has been held to have been waived where a man has claimed it, not as being part of a larger sum but where he has set up a claim to retain the chattel on a different ground: *Weeks* v. *Goode*. (4)

The question of appropriation does not arise until the lodgment of money in Court. *Clayton's Case* (5) was decided at a time when it was difficult to get at the truth from the witnesses before the Evidence Act. Now the evidence is taken and there is no strait-jacket of *Clayton's Case*. (5) These cabs were in pawn, and it was the intention of the defendants that the lien should be preserved. The circumstances rebut the presumption in *Clayton's Case*. (5)

Cave K.C. in reply. It was not suggested that a common law lien was claimed before the hearing; the lien claimed was under the agreement, and was a lien for the balance of a general account. It is not open now for the defendants to claim a common law lien.

Cur. adv. vult.

July 29. LORD HANWORTH M.R. [after stating the facts, continued:] The trial of this action was postponed until

(1) [1905] 1 K. B. 136.
(2) (1824) 2 Bing. 23.
(3) 4 M. & W. 270.
(4) (1859) 6 C. B. (N. S.) 367.
(5) (1816) 1 Mer. 572.

after the trial of a similar case before Rowlatt J. on May 2, 1927. By a letter dated May 12, 1927, written on their behalf, the defendants purported to make an appropriation of the total sum of 1127*l.* 16*s.* 9*d.* received from Botfield from May 9, 1924, down to May 7, 1925, so as to leave their charges for repairs only still owing, on the principle declared by Lord Macnaghten in *Cory Brothers & Co.* v. *Owners of the Mecca.* (1) The system, however, on which accounts were kept and delivered, in my judgment negatives the right to appropriate the payments made as claimed by the defendants. The accounts were delivered week by week; and weekly payments were made by Botfield, sometimes of an amount on account merely, sometimes by payment of the sum due in the last week. But in all cases the defendants appropriated the sums received against the total outstanding, made up of the balance previously due, and the additional amount which had accrued for the week's supplies and work done. The total outstanding after such appropriation was communicated to Botfield, and such conduct prevents the defendants from now saying that the right of appropriation which they claim to exercise remains open to them. The intention of the creditor is to be gathered from the accounts so delivered and communicated to the debtor, and the creditor has thus determined his choice: see per Lord Macnaghten (2), and also *Simson* v. *Ingham* (3); *Friend* v. *Young* (4), per Stirling J.; and *Seymour* v. *Pickett.* (5) The accounts therefore cannot in my judgment be opened up and readjusted so as to justify a claim of lien by the defendants for such part of the various items in the accounts as would afford the right of lien to them, that is, the repairs. However, even though they may be described as maintenance, the items so incurred and charged were for repairs to the taxicabs; and it would seem that, independently of the amounts received and appropriated, there remained unpaid some items of repairs, executed by the defendants, which

(1) [1897] A. C. 286.
(2) Ibid. 294.
(3) (1823) 2 B. & C. 65, 73.
(4) [1897] 2 Ch. 421, 437.
(5) [1905] 1 K. B. 715, 722.

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would afford them the right of lien upon each of the cabs respectively, although for a sum much smaller than the amount of 94*l.* 11*s.* 1*d.* claimed.

The plaintiffs, however, rely upon clauses 4 and 5 of the hiring agreement as preventing Botfield from creating any lien which would prevent their right to the return of the taxicabs. The defendants knew that the cabs were held by Botfield, under hire-purchase agreements, though they did not know the precise terms of the conditions contained in those agreements. That such a lien arises as a right of the repairer is clear from *Keene* v. *Thomas* (1) and *Green* v. *All Motors, Ld.* (2), and although the contract between the plaintiffs and Botfield contained the clauses to which I have referred, that contract did not in my judgment defeat the right of the defendants which was derived, not from Botfield, but was a right which arose to them against Botfield upon the execution by them of the repairs, and is not defeated by an unknown condition in the agreement made between the plaintiffs and Botfield. This view is in accord with those expressed by Swift J. and by Rowlatt J. in the earlier case, that there was a lien in favour of the defendants.

It was argued that the lien was lost by the despatch of the taxicabs from the garage for use in the ordinary course of their purpose. There was evidence that an agreement had been made by the defendants with Botfield in December, 1924, that the taxicabs, even if permitted to leave the garage for use, should be treated as "in pawn," that is, that the lien should not be lost. In my judgment the defendants did have a right of lien upon the three cabs in their possession in May. Botfield could not have complied with the terms of his agreement to keep the cars in repair, without the lien arising to the defendants if their account for them was unpaid.

There remains, however, the question whether the defendants have lost their lien by their demand for a sum considerably beyond the true sum for which their lien stood good. In many cases of lien it is not possible to name the exact sum due, so as to enable the owner to tender it and

(1) [1905] 1 K. B. 136. (2) [1917] 1 K. B. 625.

obtain possession of his goods; for instance, in a claim for general average, as in *Huth & Co.* v. *Lamport* (1), where Lord Esher said that a tender would have to be made of a reasonable sum to cover the approximate sum due at the risk on either side of its proving adequate or the reverse.

In the present case the plaintiffs appear to have refused to recognize any claim of lien in reliance upon the terms of their hire-purchase agreement. I do not think they were ready to make any tender to satisfy the lien. The defendants on the other hand insisted upon larger rights than they can sustain, but if they have a lien it is not lost by such a demand in the circumstances of the present case. That, I think, appears from the case of *Scarfe* v. *Morgan* (2), where it was decided that the lien for a small sum for the services of a stallion was not lost although a demand to retain the mare was made for such sum and for other claims arising aliunde: see also *Dirks* v. *Richards*. (3)

The lien was claimed upon the account for the repairs and other items—the repairs were never lost sight of or abandoned. It thus cannot be imputed against the defendants that they waived their right to have the true sum due to them tendered. They insisted upon their rights. Upon the issues thus joined and the claims set up on either side I am of opinion that the defendants were entitled to refuse delivery to the plaintiffs and that their defence succeeds. The actual amount for which the defendants are entitled to hold the cars must be determined, unless otherwise agreed between the parties, by an Official Referee who will have power to deal with the costs of the inquiry before him. But the appeal fails and must be dismissed. Each side has however pressed for too much, and there will be no costs of the appeal.

SCRUTTON L.J. This appeal, though not involving much money, raises questions of interest to those interested in taxicabs—the owners who let them out on hire-purchase agreements, the hirers, and the garages who repair them.

(1) 16 Q. B. D. 735. (2) 4 M. & W. 270.
(3) 4 Man. & G. 474.

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The Albemarle Supply Company let on hire to Mr. Botfield three taxicabs, which I will call the Albemarle cabs. Botfield had two other cabs. He garaged the five cabs with Hind & Co., who provided them with stabling, washing, oil, petrol and tyres, and repaired them when necessary. Up to May, 1924, Mr. Botfield, receiving weekly bills from the garage, paid them in full. From that date he began to get into arrear. The weekly accounts debited the amount in arrear brought forward; credited the amount paid, which was sometimes a lump sum, sometimes the exact amount of the current week's bill, and carried forward the balance.

In May, 1925, the owner, whose purchase instalments were also in arrear, terminated the hiring agreements and sent to fetch the Albemarle cabs from the garage. Mr. Hind said Botfield owed him money; he named an amount, 113*l.* 18*s.* 3*d.*, obtained by debiting the total charges for all five cabs, 1221*l.* 18*s.* 10*d.*, and crediting all Botfield's payments, 1108*l.* 0*s.* 7*d.* I think there is no doubt that Hind then claimed to keep the Albemarle cabs as security for the whole of Botfield's account for the five cabs. He then knew nothing about appropriation or the rule in *Clayton's Case* (1), or the difference between general and particular liens. He however gave the Albemarle Company full particulars of the credit and debit items of the account; and also gave full details of the charges for each of the three Albemarle cabs. The Albemarle Company, who thought they had a clause in their hire-purchase agreement which prevented Botfield from creating any lien against them, made no tender in respect of each of their three cabs for all or any of the repairs done to it, though they had accounts which would have enabled them with considerable trouble to make an approximate tender of the amount charged for repairs to each cab. They declined to pay anything, and sued Hind for detinue. Hind replied claiming a lien. On being asked for particulars he at first claimed a lien for 113*l.* 18*s.* 3*d.* for "repairs done and materials supplied." This figure was in fact the balance of the account for all five

(1) 1 Mer. 572.

cabs, the account including rent, washing, oil and petrol, which would not be the subject of a repairing lien. The cabs were released on payment of the 113*l.* into Court. Being ordered to give further particulars of how the 113*l.* was arrived at, he did not do so in the action, but on May 12, 1927, his solicitors wrote a long letter bringing out a balance due of 94*l.* 11*s.* 1*d.* They got this by adding to the 1221*l.* 18*s.* 10*d.* charges a small item of 9*s.*, and bringing out 1222*l.* 7*s.* 10*d.*, and deducting 1127*l.* 16*s.* 9*d.*, payments by Botfield. This sum was increased from 1108*l.* 9*s.* 7*d.* by purporting to add 19*l.* 7*s.* 2*d.*, an alleged subsequent payment by Mr. Botfield. The solicitors then proceeded to appropriate all the payments going back to May, 1924, to items for which they had no lien against the Albemarle Company. This left 124*l.* odd to spare, which they appropriated to the account for repairs to the three cabs said to be 219*l.* 5*s.* 7*d.*, leaving 94*l.* 11*s.* 1*d.* unpaid for which they now claimed a lien, as against the 113*l.* 18*s.* 3*d.* originally claimed and paid into Court. In this state of affairs the case came into Court; the weekly accounts were produced by Botfield, but the accounts given to the Albemarle Company, though very material to the question whether that company had sufficient information to require them to tender, were not produced by that company until this Court was reached; they were indeed not asked for by the defendants.

The plaintiffs' first line of attack on the lien claim was a clause in their hire-purchase agreement providing that "the hirer shall not have or be deemed to have any authority to pledge the credit of the owners for repairs to the vehicle or to create a lien upon the same in respect of such repairs." This Court in *Green* v. *All Motors, Ld.* (1) has held that the mere knowledge by the repairer that there is a hire-purchase agreement without knowledge of its exact terms relating to the car which he repairs does not deprive him of his lien. The owner leaving the cab in the hands of a man who is entitled to use it gives him an implied authority to have it repaired with the resulting lien for repairs. Rowlatt J.

(1) [1917] 1 K. B. 625.

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had held in a previous case, and the judge below in the present case followed his decision, that a contractual limitation of authority not communicated to the repairer does not limit the implied authority derived from the hirer's being allowed to possess and use the car. I agree with this view; if a man is put in a position which holds him out as having a certain authority, people who act on that holding out are not affected by a secret limitation, of which they are ignorant, of the apparent authority. The owners can easily protect themselves by requiring information as to the garage where the cab is kept, and notifying the garage owner that the hirer has no power to create a lien for repairs. They will thus escape the lien, though they may not get their cab repaired.

The plaintiffs next contended that any lien was lost because the cabs went out of the possession of the garage each day to ply for hire. The defendant proved an agreement with Botfield at a time when the lien existed, that the cabs should go out for hire each day on the terms that they should be returned to the garage each night, the lien continuing while the cabs were in possession of the garage. I do not think any plying for hire under this agreement prevented the lien, if any, from continuing, and in my view repair of a damaged cab, though it may be described as "maintenance," gave rise to a repairer's lien.

It was next said that the lien for repairs was lost inasmuch as it was originally claimed for a larger amount and a different cause than the right one. I have considered the numerous authorities cited, and in my view the law stands as follows: A person claiming a lien must either claim it for a definite amount, or give the owner particulars from which he himself can calculate the amount for which a lien is due. The owner must then in the absence of express agreement tender an amount covering the lien really existing. If he does not, unless excused, he has no answer to a claim of lien. He may be excused from tendering (1.) if he has no knowledge or means of knowledge of the right amount; (2.) if the person claiming the lien for a wrong cause or amount makes it clear that he will not release the goods unless his

full claim is satisfied, and that claim is wrongful. The fact that the claim is made for more than the right amount does not matter unless the claimant gives no particulars from which the right amount can be calculated, or makes it clear that he insists on the full amount of the right claimed: see *Scarfe* v. *Morgan* (1); *Dirks* v. *Richards* (2); *Huth & Co.* v. *Lamport* (3), per Lord Esher; and *Rumsey* v. *North Eastern Ry.* (4), per Erle C.J. and Willes J.

In the present case the accounts handed to the plaintiffs show the items relating to the repairs to each cab, and the plaintiffs did not tender because they thought their agreement prevented the creation of a lien, not because they could not ascertain what repairs were done. I do not think the defendants ever pinned themselves definitely to a demand for the whole sum. They showed the whole of their bills against Botfield, and, as Mr. Hind said, "wanted to come to some arrangement."

The lien not being lost, there remains the question of amount. The amount claimed was wrong on the ground on which it was originally claimed, a balance of all accounts. I do not think the defendants after delivering accounts every week showing the balance then due were entitled to reopen all these accounts, and appropriate payments which had been used to discharge contemporary claims to quite different items. The rule in *Clayton's Case* (5) appears to me to apply to current accounts for goods supplied and work done rendered periodically with a balance carried forward, just as it does to banking accounts. *Hooper* v. *Keay* (6) was a current account for supply of goods, and the Court cite with approval and apply Bramwell B.'s statement in *City Discount Co.* v. *McLean* (7): "I quite agree with the principle of the cases cited such as *Clayton's Case* (5) and *Bodenham* v. *Purchas* (8) . . . . it was reasonable to hold that the earlier items of debit were extinguished by the earlier items of credit." Applying this rule, the defendants' attempted

(1) 4 M. & W. 270.
(2) 4 Man. & G. 574.
(3) 16 Q. B. D. 735, 736.
(4) 14 C. B. (N. S.) 641, 651, 654.
(5) 1 Mer. 572.
(6) 1 Q. B. D. 178.
(7) (1875) L. R. 9 C. P. 692, 698.
(8) (1818) 2 B. & Al. 39.

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appropriation was too late and the ultimate balance due must be treated as applying the last items in point of time making up that amount. The judgment for 94*l.* 11*s.* 1*d.* must therefore be discharged, and, unless the parties can agree, an inquiry ordered before an Official Referee, unless the parties agree to a special referee, as to the amount of items for repairs of the three cabs included in the ultimate balance ascertained as above.

SARGANT L.J. The first question is whether the hirer Botfield could create as against the plaintiffs and in favour of the defendants any lien at all on the three taxicabs in question for the cost of necessary repairs. In my judgment he could. The general relations between him and the plaintiffs were such as to render it inevitable that the cabs should be repaired from time to time, and for that purpose ordinary business requirements involved the employment of third persons to do the repairs. And, this being so, it followed that these third parties would obtain a lien for the cost of the repairs, which, of course, involved the improvement on each occasion of the existing condition of the cabs: *Green* v. *All Motors, Ld.* (1) The existence in the agreement of September 13, 1922, of a special clause preventing the hirer from creating any lien for repairs does not, in my judgment, operate to the prejudice of the defendants in the absence of their knowledge of that clause. The result might be otherwise if (as is not the case) the defendants had to rely upon any authority specially given to the hirer by the agreement. In that case the special authority could hardly be invoked except subject to the special limitation. I may add that the present case is quite different from *Hatton* v. *Car Maintenance Co.* (2) There, the dispute was between the owners and the hirer only, and the rights of third parties were not involved.

Next comes the question of the extent of the lien, if any. The fact that one general account was rendered, relating to these three cabs and two others, and including items for

(1) [1917] 1 K. B. 625. (2) [1915] 1 Ch. 621.

garage, washing, petrol, grease and so on, does not, in my opinion, operate as a waiver of the three separate liens in respect of those items which represent repairs to each of the three cabs respectively. But the facts as to the successive payments on account of the total amount from time to time owing on the general account, and as to the striking of successive weekly balances, involve the application of the rule in *Clayton's Case* (1), and deprive the defendants of the right to make any such appropriation as is contended for in their advisers' letter of May 12, 1927.

In my judgment the defendants had an enforceable lien on each separate cab only to the extent of the cost of repairs to that particular cab, so far as unpaid at the date of the issue of the writ; and in ascertaining the cost so remaining unpaid the payments on account from time to time made by Botfield are to be applied in paying in chronological order the various items of the general bill irrespective of their nature.

The last question is the very important one of the costs of the action, and it is this question which has been the principal subject of the argument before us. In my judgment the case on this point is governed by *Scarfe* v. *Morgan* (2), and indeed is a stronger case in favour of the defendants. Though the defendants claimed much too large a lien, they were entitled to a lien to a smaller extent, and the plaintiffs had the materials for ascertaining the true extent of the lien, and for making a tender accordingly. And it is clear that the plaintiffs were concerned, not with the question of amount, but with the question whether any lien at all could be created. They wanted to establish that their special clause got over the decision in *Green* v. *All Motors, Ld.* (3) I agree in the judgment proposed.

Appeal dismissed.

Solicitors for the appellants: *Amery Parkes & Co.*
Solicitors for the respondents: *Edmond O'Connor & Co.*

(1) 1 Mer. 572. (2) 4 M. & W. 270.
(3) [1917] 1 K. B. 625.

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Oct. 27.

GREYHOUND MOTORS, LIMITED (APPELLANTS) *v.* LAMBERT (RESPONDENT).

Local Government—Stage Carriage—Motor Coach—"Plying for hire"—"Antecedent" Contract of Carriage—Tickets bought ten Minutes before Arrival of Omnibus at intermediate Booking Office—But after Beginning of Journey—Metropolitan Public Carriage Act, 1869 (32 & 33 *Vict. c.* 115), *s.* 7.

A motor coach which belonged to the appellants and carried passengers between London and Bristol, but was not licensed to ply for hire in the Metropolitan Police District, picked up at certain points within the Metropolitan Police District passengers who, before the arrival of the coach at those points, but after its departure from the place where it began its journey, had obtained tickets entitling them to travel to destinations outside the Metropolitan Police District. The appellants had exhibited posters in which it was stated that passengers entering a coach in London must obtain tickets at least ten minutes before the arrival of the coach at the booking office:—

Held, that, as the appellants clearly had contemplated that the coach might start on its journey with vacant seats all or some of which might be filled within the Metropolitan Police District by persons who had not taken tickets before its departure on its journey, it was plying for hire within the Metropolitan Police District within s. 7 of the Metropolitan Public Carriage Act, 1869, which imposes a penalty on the owner of an unlicensed stage carriage which plies for hire.

Per Salter J. The appellants solicited passengers partly by the posters (which contained time-tables and fares as well as the notice referred to) and partly by the fact that their coaches were seen to pass along the route every day at fixed times.

Sales v. *Lake* [1922] 1 K. B. 553 distinguished.

CASE stated by a Metropolitan police magistrate.

At a court of summary jurisdiction sitting at West London Police Court an information was laid by the respondent, a Metropolitan police sergeant, against the appellants, alleging that they were on May 26, 1927, the owners of a stage carriage, to wit, a motor omnibus, found plying for hire between Hammersmith Road and Cranford Bridge, within the Metropolitan Police District, such carriage not being licensed to ply for hire within the limits of the district, contrary to s. 7 of the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115).

Upon the hearing of the information the following facts were proved or admitted:—

The appellants were the owners of a large number of motor coaches which carried passengers between London and Bristol.

They maintained branch offices at 229 Hammersmith Road; at the Clarendon Restaurant, Hammersmith; and at Hounslow; all being within the Metropolitan Police District. On May 26, 1927, there was exhibited in the window of the office at 229 Hammersmith Road a poster, in which notice was given that London passengers must have obtained tickets ten minutes before the omnibus arrived at the booking office. The poster also contained a list of places on the road from Bristol to Hammersmith and a list of places on the road from Hammersmith to Bristol giving the times at which a motor omnibus belonging to the appellants was expected to arrive at and to depart from them. Certain fares which related to somewhat longer journeys than any within the Metropolitan Police District were specifically stated, but there was added in conspicuous type the information that there were "intermediate fares to all stages between Bristol and London at pro rata rates."

At 8.30 A.M. on May 26, 1927, P.-S. Lockyer obtained at the office at 229 Hammersmith Road a ticket entitling him to travel to Slough, a place outside the Metropolitan Police District, for which he paid 1*s.* 9*d.* At the time when he obtained the ticket there was no motor coach present belonging to the appellants. At 8.54 A.M. on the same day a motor coach belonging to the appellants drew up outside the office, was entered by P.-S. Lockyer and one other passenger, and drove off.

The motor coach was driven to the Clarendon Restaurant, where three other passengers entered it. It started from the Clarendon Restaurant at 8.59 A.M., and was driven to Hounslow, stopping on the way at High Road, Chiswick, and High Street, Brentford, at neither of which places did any other passengers board it.

At 9.10 A.M. on the same day the respondent and another police officer, P.-S. Bryant, obtained at the appellants' office at Hounslow tickets entitling them to travel from Hounslow to Maidenhead, a place outside the Metropolitan Police District, for which they paid 1*s.* 9*d.* At the time when the last mentioned tickets were obtained the motor coach had

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not arrived at Hounslow. At 9.30 A.M. on the same day the motor coach, with P.-S. Lockyer and the other four passengers in it, arrived at Hounslow, and was entered by the respondent, by P.-S. Bryant and by two other passengers, after which it continued its journey to Slough.

At Colnbrook, between Hounslow and Slough, the respondent informed the driver and the conductor that P.-S. Lockyer, P.-S. Bryant and himself were police officers, and left the motor coach, which continued its journey.

The motor coach was not licensed to ply for hire within the Metropolitan Police District.

The appellants called no evidence, but it was stated on their behalf, and the magistrate accepted the statement, that all their offices were in telephonic communication, and if bookings were insufficient a journey would be cancelled.

On the part of the respondent it was contended that the above facts constituted a plying for hire by the motor coach within the limits of the Metropolitan Police District.

On the part of the appellants it was contended that, as there had been no soliciting of or waiting for passengers, but an antecedent contract of carriage in each case, there had been no plying for hire within the limits of the district.

The magistrate was of opinion that there had been solicitation of passengers both before and after the motor coach left the office, 229 Hammersmith Road, by means of posters, and that there were no real antecedent contracts of carriage in respect of the police officers who bought tickets and boarded the coach soon after on its arrival at the two stopping places mentioned en route for Bristol. He held that there had been a plying for hire within the Metropolitan Police District, and he accordingly convicted the appellants, imposed on them a fine of 5*s*., and ordered them to pay three guineas costs.

The appellants, being dissatisfied with this determination as being erroneous in point of law, applied to the magistrate to state a case setting forth the facts and the grounds of his decision for the opinion of the Court whether he had come to a correct decision.

Paley Scott for the appellants. There was no plying for hire by the appellants' motor coach within s. 7 of the Metropolitan Public Carriage Act, 1869. "Plying for hire" connotes solicitation by the presence of a vehicle of the public to enter it and take a seat if one is available. "The carriage itself should be exhibited": per Channell J. in *Cavill* v. *Amos*. (1) The vehicle must be ready to be entered by any person who sees it and desires to travel by it, and in those circumstances the mere interposition of the formality of getting a ticket between the solicitation of the passenger by the presence of the vehicle and the passenger's entering it will not prevent its plying for hire. But those circumstances are not present in this case, which is thus distinguishable from *Foinett* v. *Clark*. (2) "There must be a general invitation by the person in charge of the vehicle to members of the public to make contracts with him for carriage in the vehicle": per Salter J. in *Leonard* v. *Western Services, Ld.* (3) The only distinction between that case—in which a vehicle was held not to be "plying for hire" because a passenger who had a return ticket entered it—and the present matter is that here the appellants invited the public by posters to take tickets. To constitute "plying for hire" "there must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them": per Lord Trevethin C.J. in *Sales* v. *Lake* (4); by which decision, it is submitted, the present case is concluded, since the passengers here bought tickets for the journey which they required before the arrival of the motor coach at that particular point. The appellants did not solicit the public with the coach; they merely held out by posters a promise that there would be a coach at certain places at certain times if sufficient passengers presented themselves. All the seats in the coach were numbered and were allotted to the various passengers, and only those persons who held tickets which they had previously obtained were

(1) (1900) 64 J. P. 309; 16 Times L. R. 156.
(2) (1877) 41 J. P. 359.
(3) [1927] 1 K. B. 702, 709.
(4) [1922] 1 K. B. 553, 557.

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allowed to enter the coach. The magistrate confused solicitation by the posters with plying for hire.

Roome for the respondent. The fundamental distinction between the present case and *Sales* v. *Lake* (1) is that in that case the seats in the charabanc were all "booked" before it started on its journey—before even it was hired by the persons who sold the tickets. That was a vital consideration in the minds of the Court: see per Lord Trevethin C.J. (2) In the present case the coach started on its journey from 229 Hammersmith Road, and while it was actually in transit to Hounslow passengers at Hounslow were "booking" seats in it. As was said by Lord Hewart C.J. in *Armstrong* v. *Ogle* (3): "When this particular omnibus set out upon its journey all the driver of it knew about the persons he was to collect and pick up . . . . was that they were to belong to a large, unknown, indeterminate class of persons who happened to possess . . . . tickets, and to whom, if they attracted his attention, he was to offer a place in his omnibus." Lord Hewart C.J. added: "If that is not picking up passengers, I do not know what is. . . . . Here there was not a private hiring; there was a public and general service."

[He was stopped.]

Paley Scott replied.

LORD HEWART C.J. The real contention of the appellants both in this Court and in the Court below was that the present case is covered by *Sales* v. *Lake*. (1) A comparison between that case and the present, however, shows what so often appears—namely, how exceedingly misleading a phrase may be if its meaning is not examined. The phrase here which seems to have become a catchword is "antecedent contract." Antecedent to what? In *Sales* v. *Lake* (1) the passengers bought their tickets before the time of the departure of the vehicle. Indeed, it was not until after the number of passengers had been ascertained that the respondents in that case hired the vehicle. The magistrate found expressly that

(1) [1922] 1 K. B. 553. (2) [1922] 1 K. B. 558, 559.
(3) [1926] 2 K. B. 438, 446.

there was no plying for hire, because no member of the public could have obtained a seat in the vehicle at any of the places where the passengers were picked up unless he had bought a ticket elsewhere before the starting of the vehicle. In giving judgment Lord Trevethin C.J. said (1): "If there had been any empty seats for which the driver was prepared to take in casual passengers, I think he would have been plying for hire, but the magistrate's finding negatives this suggestion."

In my opinion, that case was the very opposite of the present case. Here there are contemplated four different starting points within the Metropolitan Police District. The vehicle starts from 229 Hammersmith Road at 9 A.M. It leaves Brentford at 9.20, Hounslow at 9.30, and Colnbrook at 9.55. What is its true aspect in the eye of the law when it starts from 229 Hammersmith Road? Non constat that at that moment it has any passengers at all. Obviously it is contemplated that it may start with vacant places all or some of which may be filled at Brentford, Hounslow, or Colnbrook by persons who not only have not reserved accommodation before 9 o'clock, but may not even have made up their minds to take the journey that day until, in the case of those joining the vehicle at Colnbrook, nearly 10 o'clock, when it has accomplished a part of its journey, which occupies something like three-quarters of an hour. Stress has been laid on the fact that here the passengers had to obtain a ticket from an office and not from any one on the vehicle. That seems to me to be quite immaterial for the reasons explained in *Foinett* v. *Clark*. (2)

In my opinion the magistrate had ample evidence to justify him in coming to the conclusion to which he did, and therefore this appeal must be dismissed.

AVORY J. I am of the same opinion. The importance of this case from the public point of view is that if vehicles such as this are not licensed they may start on their journeys in quite an unfit condition and may be driven by incompetent

(1) [1922] 1 K. B. 558. (2) 41 J. P. 359.

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persons. That being so, it is obvious that the Court ought not to differ with the magistrate, unless the case is governed by *Sales* v. *Lake*. (1) As my Lord has pointed out the essential difference between the present case and *Sales* v. *Lake* (1) is to be found in the facts. The vehicle there started for Brighton from Charing Cross, and, although it picked up passengers en route at Grosvenor Gardens, Vauxhall Bridge Road and other places, no passenger was accepted at any stopping place except those who had obtained tickets before the vehicle started from Charing Cross. In other words, the passengers who were picked up had made contracts to be carried for the journey before the vehicle started from Charing Cross. In fact, they made these contracts before the vehicle was hired. The magistrate expressly held that there was no plying for hire at Grosvenor Gardens, because no member of the public could have obtained a seat in the vehicle at that stopping place unless he had previously bought a ticket elsewhere. The judgment of Lord Trevethin is based on the same ground. He said (2): "The information in the present case charged that the driver was plying for hire while he was in Grosvenor Gardens. The learned magistrate has however found that when the carriage was in Grosvenor Gardens no member of the public could have obtained a seat in the vehicle for that journey who had not previously booked his ticket elsewhere. That is to say the process of soliciting was then over and the driver was merely receiving passengers who had already booked their seats. On this ground alone in my judgment the magistrate was right in refusing to convict."

That being the distinction between the present case and *Sales* v. *Lake* (1) I have no hesitation in saying that we cannot differ from the finding of the magistrate, and that therefore the appeal must be dismissed.

SALTER J. I am of the same opinion. The vehicle in question in this case carried passengers between Bristol and London and London and Bristol, following an ascertained route and travelling by fixed stages, which were notified

(1) [1922] 1 K. B. 553. (2) [1922] 1 K. B. 558.

to the public by posters and by the tickets supplied to passengers. The starting point in London was the appellants' office at 229 Hammersmith Road. The journey to Brentford occupied twenty minutes and that to Hounslow thirty minutes. If when the vehicle started from Hammersmith Road there were any vacant seats—and there might or might not be—any member of the public who had come to the stopping place at Brentford or Hounslow could obtain a ticket to journey to any of the stages towards Bristol, provided he got it ten minutes before the arrival of the vehicle to take him up. On these facts the case seems to me plainly to fall within the two conditions which must exist to constitute plying for hire, and which were applied by Lord Trevethin C.J. in *Sales* v. *Lake* (1), when he said : " There must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them." The soliciting here would be partly by the posters and partly by the fact that this vehicle was seen and known to pass along the route every day at fixed times. Lord Trevethin goes on to say that the test is that " the owner or person in control who is engaged in or authorizes the soliciting or waiting must be in possession of a carriage for which he is soliciting or waiting to obtain passengers." Here any one who pleased might travel by this vehicle. The distinction between the present case and *Sales* v. *Lake* (1) has already been pointed out. In that case the driver of the vehicle was told to pick up at various points suitable to them the particular persons who had previously taken tickets, and he was not authorized to pick up any other persons, and he did not do so.

In my opinion the magistrate in the present case was right in holding that the appellants' motor coach was plying for hire in the Metropolitan Police District, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants : *Calder Woods & Sandiford, for F. E. Metcalfe, Bristol.*

Solicitors for respondent : *Wontner & Sons.*

(1) [1922] 1 K. B. 553, 557.

G. F. L. B.

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May 13, 17; *June* 2.

CROSSINGHAM *v.* PARK.

County Court—Jurisdiction—Money-lender—Money advanced over 100*l.*—*Bill of Sale as Security—Claim by Borrower to reopen Transaction—Whether sustainable in County Court—County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 67—*Money-lenders Act,* 1900 (63 *&* 64 *Vict. c.* 51), *s.* 1, *sub-s.* 2.

By s. 1, sub-s. 2, of the Money-lenders Act, 1900: "Any court in which proceedings might be taken for the recovery of money lent by a money-lender shall have and may, at the instance of the borrower . . . ., exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent. . . . ."

Where under a contract between money-lender and borrower the whole amount of the "money lent," whether repayable by instalments or otherwise, without the addition of any claim arising under the agreement to pay interest or expenses, inquiries, fines, bonus, premium, renewals, or any other charges, is a sum within the jurisdiction of the county court, then the borrower may make application under s. 1, sub-s. 2, of the Money-lenders Act, 1900, for relief, but not otherwise.

The test for determining whether a Court is one in which a money-lender may competently take proceedings for the recovery of money which he alleges to be due to him by a borrower is the amount of the "money lent," and not the amount of any instalment which is due and payable at any particular time.

Appeal from Wandsworth County Court.

The plaintiff, Crossingham, in February, 1924, borrowed from the defendant, Park, a registered money-lender, a sum of 250*l.*, repayable by monthly instalments of 15*l.*, the rate of interest charged for the advance being 60 per cent., and he gave as security a bill of sale on certain furniture, effects, and other chattels.

The plaintiff by January, 1927, had paid 372*l.* 10*s.* to the defendant in repayment of principal and interest, but the defendant alleged that money was still due to him from the plaintiff in respect of the transaction, and threatened to issue execution in default of payment.

The plaintiff thereupon commenced proceedings in the Wandsworth County Court under s. 1, sub-s. 2, of the Money-lenders Act, 1900 (1), claiming a declaration that the

(1) Money-lenders Act, 1900, s. 1, sub-s. 1: "Where proceedings are taken in any court by a money-lender for the recovery of any money lent . . . . or the enforcement of any agreement or security made or taken . . . . in respect of money lent . . . . and there is evidence

transaction was harsh and unconscionable, and that the interest charged in respect of the sum lent was excessive, and asking that the court might reopen the transaction and order the repayment to the plaintiff of such sum as the county court judge should think fit not exceeding 100*l.*, and claiming an injunction to restrain the defendant from issuing execution upon the bill of sale.

At the hearing in the county court objection was taken by the defendant that the county court judge had no jurisdiction to entertain the application, as the defendant alleged that under the terms of the contract more than 100*l.* was owing to him by the plaintiff. It was contended on behalf of the plaintiff that the county court judge had jurisdiction to deal with the matter, inasmuch as under the contract the defendant might have sued for a monthly instalment of 15*l.*, in which case the borrower might have raised this question by counterclaim. Further, the defendant might have enforced his mortgage security under the bill of sale in the county court by virtue of s. 67 of the County Courts Act, 1888.

The county court judge held that he had no jurisdiction to entertain the application, as the amount claimed to be due to the money-lender exceeded 100*l.*, and further that the fact that the defendant could have taken proceedings under s. 67 of the County Courts Act, 1888, to enforce the mortgage

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which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable . . . . the court may reopen the transaction. . . . ."

Sub-s. 2: "Any court in which proceedings might be taken for the recovery of money lent by a money-lender shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived."

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security contained in the bill of sale granted by the plaintiff as security for the loan did not give the court jurisdiction to entertain the plaintiff's action under s. 1, sub-s. 2, of the Money-lenders Act, 1900.

The plaintiff appealed.

S. P. Kerr for the plaintiff. The county court judge had jurisdiction to hear this application. It is most important that county courts should be open to those who borrow from money-lenders, as they are generally persons of restricted means who would fear to initiate proceedings in the High Court. Lord Macnaghten pointed out in *Samuel* v. *Newbold* (1) that "any branch of the High Court, any county court, any Court in the kingdom, to which the money-lender may resort for the purpose of enforcing his extreme rights is armed with power to protect the money-lender's victim." This debt was repayable by instalments of 15*l.* each and the money-lender could have resorted to the county court to recover an instalment, and if he had done so the borrower could have counterclaimed for a revision of the contract, and the county court judge could then have reopened the whole transaction. As the money-lender could have resorted to the county court he cannot complain if the borrower does so. The borrower could have claimed relief immediately after the agreement was made and before any repayments had accrued due. Once the jurisdiction of the Court is established it cannot be destroyed by reason of the subsequent accrual of arrears. The proper construction of s. 1, sub-s. 2, of the Money-lenders Act, 1900, is that if the money-lender could take proceedings in any Court to recover the "money lent" the borrower could come to that Court for relief. The same Court is open for both lenders and borrowers. The jurisdiction conferred by the section is a new jurisdiction, and the draftsman of the Act intended to use words which should confer jurisdiction upon all Courts in these cases irrespective of the amount of the money lent. The policy of the legislature was to give county courts jurisdiction

(1) [1906] A. C. 461, 468.

in money-lenders' cases, and there is no reason why a borrower should not be able to apply to the county court for relief whatever the amount of instalments that are due. The words of the section are general enabling words conferring jurisdiction to reopen money-lenders' contracts with borrowers upon all civil Courts entertaining actions by money-lenders for the recovery of money lent. An applicant for relief must look at other Acts to see whether he has a right to go to the county court. The action by the borrower in the county court is merely for relief and not for the recovery of money, and the amount due to the lender ought not to affect the jurisdiction of the Court, because the borrower would be invoking the equitable jurisdiction of the Court and therefore the jurisdiction of the Court would not be limited under s. 56 of the County Courts Act, 1888, and s. 3 of the County Courts Act, 1903, to 100*l.*

[TALBOT J. You must see what Courts the money-lender may go to for the recovery of the money lent, and if the money-lender cannot go to the county court for that purpose neither can the borrower go to that court for relief.]

If on a fair construction of the contract proceedings might have been taken in the county court for the recovery of an instalment as it became due, the borrower may apply to the county court for relief notwithstanding that the sum advanced by the money-lender and not repaid at that particular time exceeds 100*l.* The last words of sub-s. 2 show that the contract and not the state of the account between the parties must be looked at in order to ascertain what Court has jurisdiction to entertain an application by a borrower for relief. Lord Loreburn L.C. pointed out in *Samuel* v. *Newbold* (1) that a Court of law ought not to be alert in placing a restricted construction upon the language of a remedial Act. Under Order L., r. 33, of the County Court Rules an application by a borrower under sub-s. 2 of s. 1 of the Act of 1900 for relief must be by action commenced in the ordinary way, and the plaint note must be marked with the amount claimed. In this case it was marked not

(1) [1906] A. C. 467.

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over 100*l*. It is clear therefore that the money-lender could have counterclaimed for the money due to him.

Secondly. The money-lender in this case took as security a bill of sale which was a mortgage of goods and chattels, and he might have taken proceedings under s. 67, head 3, of the County Courts Act, 1888, to enforce his security. That section gives jurisdiction in equity to county courts in respect of mortgage securities where the mortgage does not exceed 500*l*. That "section is a general section relating to all classes of property, and including chattels as well as real property"—per Lord Alverstone C.J. in *Rex* v. *Judge Whitehorne* (1), and therefore it includes a mortgage of personal chattels such as a bill of sale. The relief given under the Money-lenders Act, 1900, to borrowers is equitable and comes under the equitable jurisdiction of the county court. Sect. 1, sub-s. 2, of the Act of 1900 adds another ground to those specified in s. 67 of the County Courts Act, 1888, for coming to the county court for relief in equity. A mortgagee of personal chattels can come to the court for a foreclosure order: see Reed's Bills of Sale Acts, 14th ed., p. 124. The reason why that procedure is not usually adopted is because a right of seizure is nearly always given in the bill of sale. A form of foreclosure decree of chattels is given in Seton, 7th ed., p. 1925, and three cases are there cited in support of the proposition that a mortgagee of personal chattels may bring an action for foreclosure: *Slade* v. *Rigg* (2); *Wayne* v. *Hanham* (3); and *Kemp* v. *Westbrook*. (4)

[*C. Bray*. It was held in *Carter* v. *Wake* (5) that a pledgee of personal chattels was not entitled to a foreclosure decree.]

That case is limited to a pledgee of personal chattels. Jessel M.R. drew a distinction in that case between a mortgagee and a pledgee of personal chattels.

[ACTON J. Your contention that in the case of every bill of sale of personal chattels not exceeding 500*l*., the grantee can take proceedings in the county court to recover up to

(1) [1904] 1 K. B. 827, 829.
(2) (1843) 3 Hare, 35.
(3) (1851) 9 Hare, 62.
(4) (1749) 1 Ves. Sen. 278.
(5) (1877) 4 Ch. D. 605.

500*l.*, has been advanced to-day for the first time, although the Bills of Sale Act was passed in 1878. The cases that have been cited in support of your proposition are all cases of mortgage of stocks.]

It is sufficient for my argument that there are proceedings which might be taken by a mortgagee of chattels, and the statement in Reed's Bills of Sale Acts shows that a mortgagee of personal chattels is entitled to a foreclosure decree.

Charles Bray for the defendant. The county court judge was right in holding that he had no jurisdiction to entertain the application. The original plaint shows that the borrower when he brought his action thought that the jurisdiction of the county court in that matter was limited to 100*l.*, because he abandoned any excess over 100*l.* in what he claimed to recover back. The action, but for the Money-lenders Act, is not one which comes within the jurisdiction of the county court. Sect. 1, sub-s. 1, of the Money-lenders Act, 1900, only applies when proceedings are taken by the money-lender for the recovery of any money lent, and in that case the borrower can apply to the court for relief. The money-lender must bring his action in the competent Court, and the test for deciding whether the competent Court is the High Court or the county court is the amount of money lent. The word "might" in sub-s. 2 must mean "may," and the sub-section means "any court in which proceedings may be taken for the recovery of money lent by a money-lender" may at the instance of the borrower exercise the like powers as may be exercised under sub-s. 1. The borrower therefore may bring his action for relief in any Court in which it is competent for the money-lender to bring his action for recovery of the money lent. Sub-s. 1 says: "Where proceedings are taken . . . . for the recovery of any money lent," and that must mean the whole sum lent. Sub-s. 2 does not mean that because a money-lender has the right to take proceedings in the county court to recover an instalment of the money lent which has become due therefore the borrower has at all times the right to go to the county court for relief.

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Sub-s. 2 must be read together with sub-s. 1. If a money-lender takes proceedings in the county court to recover an instalment he makes it possible to the borrower to ask for relief. A county court has jurisdiction to entertain a borrower's action for relief if, and only if, it would have jurisdiction at that time to entertain an action by the money-lender to recover the money lent. *Saunders* v. *Newbold* (1) shows that the limitation in sub-s. 2 is a limitation to a Court in which proceedings might be taken by a money-lender for recovery of money lent. Sect. 67 of the County Courts Act, 1888, does not give a borrower power to go to a county court for relief under its equitable jurisdiction. The only power that a borrower has to make a substantive application to the Court for relief is under s. 1, sub-s. 2, of the Money-lenders Act, 1900.

S. P. Kerr replied.

Cur. adv. vult.

June 2. The judgment of the Court (ACTON and TALBOT JJ.) was read by

ACTON J. The question in this case is in what circumstances a borrower from a registered money-lender may have recourse to the county court in an application for relief under sub-s. 2 of s. 1 of the Money-lenders Act, 1900. [His Lordship read the sub-section and continued :] In order to ascertain the meaning of this sub-section it is in our opinion necessary to read it along with sub-s. 1, and to compare the two sub-sections with some care. Sect. 1, sub-s. 1, begins with the words : "Where proceedings are taken in any court by a money-lender . . . .," and sub-s. 2 begins with the words : "Any court in which proceedings might be taken . . . . by a money-lender . . . ." The first question is what is the meaning of the words "might be taken" in this latter phrase. In our opinion the true meaning of this phrase is "Any court in which (so far as amount is concerned) it would be competent for a money-lender to take proceedings, if he were minded so to do." The insertion of the parenthesised words

(1) [1905] 1 Ch. 260, 277.

is due to a consideration of the concluding words of the sub-section—namely, "notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived"—the effect of which is discussed later.

The next point to be observed is as follows: Sub-s. 1 deals with "proceedings" of more than one kind—namely, (*a*) "for the recovery of any money lent," or (*b*) for "the enforcement of any agreement or security made or taken . . . . in respect of money lent." Sub-s. 2 deals with "proceedings" of one kind only—namely, "for the recovery of money lent," and there stops.

Now the claim of a registered money-lender is commonly upon some negotiable instrument, such as a bill, note, or IOU, but whether it be so or not, it is always analysable into (*a*) a claim for "money lent," and (*b*) a claim or claims arising under an agreement or agreements to pay interest on or in respect of the amount of the loan, or other sums for "expenses, inquiries, fines, bonus, premium, renewals, or any other charges," to employ the words of the Act of 1900. This analysis is familiar in the practice in the King's Bench Division under Order XIV. since the decision in *Lazarus* v. *Smith* (1), the result of which is that in a registered money-lender's action if it appears that the whole or some part of the money "actually advanced" by the money-lender is still owing by the borrower, after crediting him with every payment made by him to the money-lender, irrespective of whether it purported to be in payment of principal or interest or charges, the plaintiff is entitled to judgment for that amount as "the principal sum admitted to be due"—per Cozens-Hardy M.R. (2)—or as "a debt which is admitted, quite irrespective of any matter with which that Act has to deal"—per Kennedy L.J. (3) "The Money-lenders Act," says the Lord Justice, "only relates to transactions which can be reopened and modified under its provisions, and what would be reopened and modified under those provisions is not the amount of an admitted debt apart from all questions of bonus

(1) [1908] 2 K. B. 266. (2) [1908] 2 K. B. 268.
(3) [1908] 2 K. B. 269.

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or interest, or of bonus or interest consolidated with principal."

In the light of this decision and what is therein involved, consideration now reverts to the meaning of s. 1, sub-s. 2, of the Act of 1900. It can hardly be suggested that the difference in the wording of the two sub-sections to which attention has already been drawn—namely, that sub-s. 1 deals with proceedings for the recovery of money lent and also of other claims of different kinds, whereas sub-s. 2 deals only with proceedings for the recovery of money lent and there stops, is without its significance. In our opinion this gives the clue to the correct meaning of sub-s. 2. We think that the test whether a Court is a Court in which it would be competent for "a money-lender" (that is, for any particular money-lender) to take "proceedings for the recovery of *money lent*" is a test to be applied with reference to the strict meaning of the two italicized words. If the whole amount of the "money lent," whether repayable in instalments or otherwise, without the addition of any claims arising under an agreement or agreements to pay interest, or "expenses, inquiries, fines, bonus, premium, renewals, or any other charges," is a sum within the jurisdiction of the county court, then in every such case, even though the money-lender has not taken any proceedings, and though the time has not come for taking proceedings, the borrower may make application under the Act to the county court, but not otherwise. This interpretation gives their ordinary and simple meaning to the words "money lent" and is applicable to every case. The fact is that a claim by a money-lender is often loosely regarded as a claim for "money lent" without more, whereas it is, practically always, not merely a claim for money lent, but such a claim in combination with claims of a different nature, although they are of course incident to the transaction of borrowing the money lent.

It remains to be added that the concluding words of sub-s. 2 seem to be intended to show that the test is the amount of "money lent," and not the time at which any payment under the contract between lender and borrower becomes

due and payable. It would otherwise seem very difficult to reconcile the words "Any court in which proceedings might be taken for the recovery of money lent" with the later words "notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived." This difficulty impressed itself upon us in the course of the argument. It ceases, however, to be a difficulty if the earlier words are construed as relating solely to the amount of "money lent" irrespective of whether it is then wholly or in part due and payable, and we have not heard suggested, nor are we able to suggest, any more satisfactory reconciliation between these apparently inconsistent phrases occurring in the same sub-section. It is for these reasons that we have construed the words "Any court in which proceedings might be taken" as limited by the addition of the words "so far as amount is concerned."

We think that the learned county court judge was right in holding that this action was one under the Money-lenders Act, 1900, and not under s. 67 of the County Courts Act, 1888. The jurisdiction given by the Act of 1900 is a new jurisdiction of a special kind: see *Samuel* v. *Newbold*. (1) In our opinion the only test to be applied in an action such as this, to determine whether the county court has or has not jurisdiction to entertain an application by the borrower under s. 1, sub-s. 2, of the Act of 1900, is that which is provided by the Act itself. We think therefore that Mr. Kerr's contention that he may have recourse to s. 67 of the County Courts Act and rely upon some more or less dubious claim for redemption of the bill of sale granted by his client, as being a mortgage of personal chattels, is a contention which cannot prevail, even if there were no other grounds for rejecting it. Whether there are other grounds it therefore becomes unnecessary and inexpedient further to consider. His contention involves, however, the substitution of an inquiry whether the Court is one in which the *borrower* might take proceedings, for the inquiry whether it is one in which the *lender* might take

(1) [1906] A. C. 461.

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proceedings; and it is the latter inquiry only which the Act indicates as relevant and essential.

As it is admitted that the amount actually advanced in the present case was 250*l.*, the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Piper, Smith & Piper.*
Solicitors for defendant: *Webster Butcher & Sons.*

R. F. S.

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July 18.

VOSPER *v.* GREAT WESTERN RAILWAY COMPANY.

Railway—Passenger—Luggage—Hand Luggage—Loss—Liability of Company.

A railway company is under liability as a common carrier for loss of or damage to the luggage of a passenger lawfully travelling by the railway not only where the luggage is placed in the luggage van, but also where it is retained by the passenger as hand luggage, unless the company can prove that the passenger assumed the immediate care of the luggage so retained and that the loss or damage was occasioned by his failure to exercise proper care of it. The company is not relieved of this liability merely because the luggage is not in the carriage in which the passenger himself travels, or is placed in a carriage of a higher class.

Quaere as to the liability of a railway company for the hand luggage of a passenger who unlawfully intends to travel if possible in a class higher than that for which he holds a ticket without paying the excess fare.

Great Western Ry. Co. v. *Bunch* (1888) 13 App. Cas. 31 applied and observations considered and explained.

APPEAL from Marylebone County Court.

On Monday, March 1, 1926, shortly before 10 A.M., the plaintiff, Mr. Stanley Vosper, who held a third-class week-end return ticket from Exeter to London by the railway of the Great Western Railway Company, the defendants, went to the defendants' station at Exeter. He handed a suit case, a bowler hat and a cap to a porter in uniform, to be put in the cloak-room till he came back for the 1.45 P.M. train from Exeter to London, gave the porter the price of the cloak-room ticket, told him his name, and said he would be back about 1.15 for the afternoon train to London. The porter then

deposited the articles in the cloak-room and the cloak-room ticket was handed to him by the attendant. About 1.15 the plaintiff returned and found the porter waiting for him with the articles. They then proceeded across a bridge to the platform for the London train. Two carriages for the Exeter to London passengers were, as usual, brought to that platform at 1.25, and waited there for the London train from Plymouth, when they were attached to the rear of that train; it was a non-stop train from Exeter to London. The porter put the suit case into the train, received a tip from the plaintiff, and went away. When the train arrived at Paddington Station, London, the suit case could not be found, and no trace of it had since been seen.

In August, 1926, the plaintiff brought the present action against the defendants in the county court, claiming damages for alleged breach of contract to carry the plaintiff's luggage from Exeter to London and to deliver it to him there.

At the trial there was some conflict of evidence between the plaintiff and the defendants' servants as to what took place between them.

The plaintiff, after describing the suit case, said that he told the porter to label it, saw the porter put it in the luggage van, and gave the porter a tip, and that the porter then went away. The plaintiff further said that when the main part of the train arrived from Plymouth he went to the restaurant car and got a ticket for lunch, that he himself put his hat, coat and stick in a third-class compartment near the restaurant car, had lunch in that car, joined some friends who were in one of the Exeter coaches, stayed with them there until tea-time, went back to the restaurant car for tea, and thereafter returned with his friends to their compartment, where he remained to the end of the journey.

According to the plaintiff's evidence he never travelled in the compartment where his coat, hat and stick were, though he saw them there as he passed from the restaurant car to the carriage where his friends were.

The porter who took the plaintiff's luggage said that when the plaintiff and he went across the bridge to

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the two Exeter carriages he asked the plaintiff whether he wanted a first-class compartment, and whether he wanted a smoking compartment, and that the plaintiff answered "yes" to both questions, and that he thereupon opened the door of a first-class compartment in one of those two carriages, that on his asking the plaintiff whether he would have the suit case on the seat or the rack the plaintiff said it would be all right on the seat, that he put the suit case on the seat and the hat on the rack, received his tip, and went away.

Another porter, who at the time in question was attending to another passenger close by, gave evidence to the same effect.

The cloak-room attendant remembered having taken custody of the suit case in the morning and having delivered it up in the afternoon to the porter.

The county court judge found that the story told by the porter corresponded with what actually happened, and that at the commencement of the journey the suit case was thus in the immediate control of the plaintiff. He held, however, on the authority of *Great Western Ry. Co.* v. *Bunch* (1), that the defendants remained under the duty of common carriers unless the loss of the article was due to the negligence of the plaintiff himself, that in law the onus was on the defendants of showing that their liability as common carriers was suspended or modified by the fact that the plaintiff himself was responsible for the loss of his luggage by having caused or contributed to it through his own negligence, that as, in this case, the loss might have happened while the plaintiff was properly and reasonably taking lunch or tea in the restaurant car it could not be said to have been due to his negligence, and therefore that the defendants were liable, and he assessed the damages at 51*l.* and gave judgment for the plaintiff for that sum.

The defendants gave notice of appeal for an order that the judgment of the county court judge should be set aside and judgment entered for the defendants, on the grounds: (1.) that the judge misdirected himself as to the nature and

(1) 13 App. Cas. 31.

extent of the onus of proof resting upon the defendants to discharge them from their liability to the plaintiff as common carriers of his suit case, (2.) that upon the facts proved or admitted the judge should have held that the defendants were never common carriers of the plaintiff's suit case, and (3.) that the judge should have held that there was an implied term in the contract between the plaintiff and the defendants that the plaintiff should exercise reasonable care and supervision of his suit case, and that upon the facts proved or admitted he should have found that the plaintiff by his neglect and/or default in that regard modified and suspended the responsibility, if any, of the defendants for the safe custody of his suit case.

Barrington-Ward K.C. and *Kenelm Preedy* for the defendants, appellants. The county court judge was wrong in holding that the defendants were liable for the loss of the plaintiff's suit case. A railway company is not liable for loss of or damage to the hand luggage of a passenger where the passenger himself assumes the immediate custody and control of the luggage: *Great Western Ry. Co.* v. *Bunch* (1); *Talley* v. *Great Western Ry. Co.* (2) In the present case the county court judge has found on the evidence that the plaintiff assumed the immediate custody and control of his suit case, which by his own instructions was placed at the commencement of the journey in a particular compartment. That being so, the county court judge ought not to have held that the burden was upon the defendants of proving that the plaintiff failed to take reasonable care of the suit case. Even if the burden of proving that fact was upon the defendants it was discharged, inasmuch as the evidence showed that the loss of the suit case was due to the want of care of the plaintiff himself, who during the journey took no steps to insure its safety. A railway company is only liable for a passenger's hand luggage where it is in the carriage with the passenger himself: per Lord Halsbury in *Great Western Ry. Co.* v. *Bunch* (3) Here it was shown

(1) 13 App. Cas. 31. (2) (1870) L. R. 6 C. P. 44.
(3) 13 App. Cas. 31, 42.

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by the plaintiff's own evidence that he never during the journey travelled in the compartment with the suit case. This case is distinguishable from the cases of *Travers & Sons, Ld.* v. *Cooper* (1); *Steers* v. *Midland Ry. Co.* (2); and *Ehinger* v. *South Eastern and Chatham Ry. Co.* (3), in none of which cases was there any evidence of negligence or lack of care on the part of the plaintiff.

Phineas Quass for the plaintiff, respondent. The county court judge was right in holding that the defendants were liable.

In order to relieve a railway company of liability for loss of or damage to the hand luggage of a passenger it must be proved not only that the passenger retained the luggage under his own care but also that the loss or damage was occasioned by his failure to take due care of it. In the present case there is no evidence to show that the loss of the plaintiff's suit case was occasioned by any want of due care on his part, inasmuch as the loss may have taken place while the plaintiff was properly absent from the compartment in which the suit case was placed while having a meal in the restaurant car or otherwise. The contention that the defendants are under no liability because the suit case was placed in a carriage of a higher class than that for which the plaintiff held a ticket was not raised in the court below.

[He was stopped.]

ATKIN L.J. This is an interesting case which has arisen out of circumstances attending the course of transit of the plaintiff when a passenger upon the defendants' railway. [His Lordship stated substantially as above set out the admitted facts, the evidence of the plaintiff and of the defendants' servants respectively in regard to the defendants' suit case, and the findings of fact of the county court judge, and continued as follows :] The learned county court judge has chosen to accept the view of the defendants' servants as to the circumstances in which the

(1) [1915] 1 K. B. 73. (2) (1920) 36 Times L. R. 703.
(3) (1922) 38 Times L. R. 678.

suit case was put into the train, and, that being so, we cannot interfere with his finding that that view is in accordance with the facts.

The position therefore is that the suit case was placed by the porter in a first-class carriage at the request of the plaintiff, who held a third-class ticket. When the train arrived at Paddington the plaintiff failed to find the suit case, which in fact has been irretrievably lost. The plaintiff then brought this action against the defendants for their alleged failure to carry the suit case safely.

It is plain to my mind that it has been well established that railway companies are common carriers of passengers' luggage, whether it be luggage which is labelled and put in the luggage van or hand luggage which is taken by the passenger and not put in the van, but that in respect of the hand luggage that is not put in the van there is this modification of their ordinary liability, that they are not liable as common carriers if they can show that the loss occurred by reason of the negligence of the passenger in failing to take proper care of that luggage. The authority for that proposition appears to me to be the case of *Great Western Ry. Co.* v. *Bunch*. (1) In that case the wife of the plaintiff had arrived at Paddington station at 4.20 on Christmas Eve with a bag and two other articles of luggage in order to travel by the 5 o'clock train. A porter labelled the two articles and took them and the hand bag to the platform, the train not then being at the platform. The plaintiff's wife then told the porter to put the bag in the carriage with her and asked him if it was safe to leave it with him. He said it would be safe and that he would take care of the luggage and put it into the train. She then went to meet her husband and get her ticket. Shortly after she had left the luggage she and her husband returned to the platform and found that the two labelled articles had been put into the van of the train, but that the porter and the bag had disappeared. Apparently the porter was not identified. I do not imagine it was considered to be a case of theft, but the bag was never found. In an action

(1) 13 App. Cas. 31.

that the porter was guilty of negligence, and he held the railway company liable. The question arose as to the liability of the railway company in these circumstances. Up to that time two views had undoubtedly been expressed by the authorities. In the case to which I have referred Lord Watson has stated the controversy in a few words which seem to me conclusive and binding upon this Court. He said: "It does not admit of question that passengers' luggage, duly delivered to the company's servants for carriage in the railway van, remains during its transit at the risk of the company as common carriers; but it has always been held that it would be unreasonable and unjust to make the company liable as insurers, in cases where the passenger has assumed, in whole or in part, the custody and control of his own luggage. Whilst they have been in agreement to that extent, eminent judges have differed as to the nature of the contract under which hand-luggage is carried, some being of opinion that it is, from first to last, a contract to carry such luggage on the same terms as its owner, that is to say, with ordinary care, others being of opinion that it is throughout a contract of common carriage, modified by the personal interference of the passenger. Whichever of these views be accepted, it is manifest that, in many instances, the resulting liability of the company will be precisely the same, but, according to the second of them, the full responsibility of the company may revive on occasions when, from causes incidental to his journey, the interference of the passenger ceases for a time, and his hand-luggage is committed to the exclusive charge of their servants." (1) Lord Watson then went on to say (2): "However that may be, I prefer the principle which appears to me to have been adopted in *Richards* v. *London, Brighton and South Coast Ry. Co.* (3) and *Butcher* v. *London and South Western Ry. Co.* (4) I think the contract ought to be regarded as one of common carriage, subject to this modification, that in respect

(1) 13 App. Cas. 46.
(2) Ibid. 48.
(3) (1849) 7 C. B. 839.
(4) (1855) 16 C. B. 13.

of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory." That seems to me to be the view taken both by Lord Herschell and Lord Macnaghten and, indeed, by Lord Halsbury, who I do not think intended to modify the principle when he said : " All these learned judges appear to me to adopt the view that a railway company in accepting a passenger's luggage for carriage in a passenger train, and in the carriage with the passenger himself, do enter into a contract as common carriers, modified only to the extent that if loss happens by reason of want of care of the passenger himself who has taken within his own immediate control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default." (1)

Mr. Barrington-Ward, in accepting the view of the law there stated, as indeed he is bound to accept it, laid stress upon the words " in the carriage with the passenger himself," and suggested that it is an essential condition of the liability of common carriers by rail under the contract that the luggage should be in the carriage with the passenger. It appears to me, however, to be impossible to confine the doctrine within those narrow limits. Every one knows that in these days hand luggage is constantly carried in such circumstances that there is no room for it in the carriage in which the passenger travels, and that, with the consent and approval of the railway company, it is carried in the corridor of the carriage, either in close proximity to the compartment in which the passenger is travelling, or in as close proximity as the luggage can be put, very often in a corner at the end of the coach. It is obvious also that there cannot be a duty upon the passenger to remain in the carriage during the whole time of the journey, for there may be occasions on which he may reasonably leave and be absent from it, and indeed, he is invited by the railway company itself on occasion to be absent from it for considerable times

(1) 13 App. Cas. 31, 42.

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while taking meals in the restaurant cars which the company provides for the purpose of supplying meals. To my mind it is further an ordinary incident of railway travel that a passenger who has chosen the carriage in which he is to travel may afterwards for different reasons change his mind and travel a substantial part of the journey, or indeed, the whole of the journey, in some other carriage, as, for instance, where he has procured a seat in a non-smoking carriage and he desires to smoke, or where he has taken a seat in one carriage and joins friends whom he finds in an adjoining or some other carriage. All those cases appear to me to be cases in which the railway company is still under its liability to carry the goods as part of its contract as a common carrier.

The true view appears to be this. The passenger gives to the porter the custody of the goods for the purpose of enabling the railway company to perform its part of the contract of transit by carrying the goods safely. In the case of *Great Western Ry. Co.* v. *Bunch* (1), Lord Macnaghten said : " The contract, as the case may be, runs from, or relates back to, the commencement of the journey ; and the journey must, I think, be taken to commence, as regards passengers' luggage, at the time when the luggage is received by the company's servants for the purpose of the journey. Thenceforward the work done in taking the luggage to the platform, in putting it into the train, in conveying it to its destination, and there delivering it, must, I think, be regarded under ordinary circumstances as one continuous operation to be performed under the contract. The contract is the ordinary contract of common carriers—a contract to carry securely."

The railway company thus come under the obligation of the contract to carry the goods securely, subject to the modification which is mentioned by Lord Watson, that the company are not liable for loss to which lack of care on the part of the passenger has been contributory.

In this case the learned county court judge has found himself unable to say that the fact that the passenger did not travel with the luggage contributed to the loss or

(1) 13 App. Cas. 31, 56.

constituted any lack of care on his part. The learned judge has thrown the onus upon the defendants, and that appears to me to be right. The railway company are under the initial obligation of common carriers, and if they seek to absolve themselves by reason of a breach of the special terms to which Lord Watson referred, the duty appears to be upon them to show that the loss was occasioned by the passenger's want of care. As the learned county court judge has found in this case that the loss was not occasioned by the plaintiff's lack of care, I think his judgment must stand.

The only question of some little difficulty in this case arises from the fact that the goods were put into a first-class carriage, whereas the passenger had a third-class ticket. If it could have been established that the plaintiff had in fact no intention of ever travelling in that carriage or had the intention of travelling first-class, it might be—I do not say it would be—that a different set of circumstances would have arisen exempting the company from liability. But, on the other hand, one knows that third-class passengers do from time to time, for different reasons, travel in first-class carriages. Sometimes they do so in open violation of their rights. Sometimes they do so because there is no room in the third-class carriages and they think that that absolves them from paying the extra fare if they travel first-class. Sometimes they do so because they think it convenient to take a third-class ticket and intend to pay the first-class fare. Sometimes there is a reservation, no doubt, that they will not pay the higher fare if no one comes and asks them for it. Apart from that last case, however, those are lawful forms of user of a railway. A third-class passenger is not an outlaw when he travels in a first-class carriage. When he does so the railway company are still under a duty to him personally, and, as it appears to me, they are also under a duty to him in respect of his luggage.

When luggage which a passenger keeps under his control is lost, the question whether or not he has been guilty of a lack of care which caused the loss is of course a question of fact to be determined in every case, the onus of proving the

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lack of care being on the railway company. I can well imagine that a judge might hold that the onus was discharged if he found that the passenger on a long journey had left his luggage in a place where there were many other passengers about, paying no attention to it and travelling in a different carriage. The question, as I have said, is a pure question of fact. In this case the county court judge has found that the onus on the defendants has not been discharged.

For these reasons it appears to me that the careful judgment of the learned judge is correct in law and therefore that the appeal should be dismissed with costs.

LAWRENCE L.J. I agree. It seems to me on the authority of the *Great Western Ry. Co.* v. *Bunch* (1) that the defendants came in respect of this suit case under a general liability as common carriers, modified by an implied condition that the passenger should take reasonable care of the article. If the defendants had been able to prove that the loss was caused by the plaintiff's negligence in failing to take reasonable care of the suit case, and that it would not have happened without that negligence, then I think they would be entitled to succeed. The learned county court judge seems to me to have been right in placing the onus upon the defendants. He held that there was no evidence here which would have justified him in holding that the passenger had in fact neglected his duty to take reasonable care, and, certainly, that there was no evidence to show that, if the plaintiff had neglected that duty, the loss was occasioned by that neglect. In those circumstances I think it follows that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *A. G. Hubbard.*
Solicitor for respondents: *H. F. K. Ireland.*

(1) 13 App. Cas. 31.

J. R.

MONKS (Inspector of Taxes) *v.* EXECUTORS OF SIR G. W. FOX (Deceased).

1927
Nov. 25.

Revenue—Income Tax—Victory Bonds—Surrender in Payment of Estate Duty—Condition in Prospectus—Value—Face Value with Addition of accrued Interest—Whether accrued Interest liable to Income Tax—Finance Act, 1917 (7 & 8 *Geo.* 5, *c.* 31), *s.* 34—*Finance Act*, 1918 (8 & 9 *Geo.* 5, *c.* 15), *s.* 42.

Where Victory Bonds are transferred to the Commissioners of Inland Revenue under the provisions of s. 34 of the Finance Act, 1917, as amended by s. 42 of the Finance Act, 1918, in payment or part payment of death duties, the interest accrued to the date of transfer but then remaining unpaid, which under sub-s. 4 of s. 34 of the Act of 1917 is taken into account in making the valuation of the bonds so transferred, is not subject to income tax.

Case stated under s. 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax for the opinion of the High Court.

At a meeting of the Commissioners held on February 15, 1927, for the purpose of hearing appeals, the executors of Sir G. W. Fox, hereinafter called the respondents, appealed against an assessment to income tax in the sum of 704*l.* for the year ended April 5, 1926, made upon them under the provisions of the Income Tax Acts.

Sir G. W. Fox died on February 21, 1925. The appropriate amount of estate duty payable in respect of his estate was 257,126*l.* 9*s.* 2*d.* A portion of his estate consisted of 100,000*l.* 4 per cent. Victory Bonds.

It was provided in the prospectus relating to the issue of 4 per cent. Victory Bonds that "Bonds of this issue will be accepted at their face value by the Commissioners of Inland Revenue as the equivalent of cash, with due adjustment on account of interest, in satisfaction of amounts due on account of death duties, provided that the bonds surrendered have formed part of the estate passing on death of the deceased continuously up to the date of death from the date of the original subscription or for a period of not less than six months immediately preceding the date of death. Bonds surrendered under these provisions will be held for account of His Majesty's Government until drawn for redemption. . . . ."

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Sect. 34 of the Finance Act, 1917, provides for the acceptance by the Commissioners of Inland Revenue of any stock or bonds issued in connection with the war in satisfaction or part satisfaction of any death duty and the method of valuing such bonds. Sub-sect. 4 enacts that "Stock or bonds so transferred shall for the purposes of this section be valued at the price of issue with the addition of any interest accrued due at the date of transfer but then remaining unpaid, after deducting the amount of any interest which may be receivable by the transferor after that date."

Sub-sect. 5 of s. 34 enacts that "For the purposes of this section interest shall be deemed to accrue from day to day."

Sect. 42 of the Finance Act, 1918, enacts as follows: "Sect. 34 of the Finance Act, 1917, shall have effect as though there were inserted therein after the words 'price of issue,' in sub-s. 3 and sub-s. 4 thereof, the words 'or such other price as was specified in the conditions subject to which the stock or bonds were issued as the price at which the stock or bonds were to be valued for the purposes of this section.'"

Victory Bonds fall within the above provisions.

The transfer of the 100,000*l.* 4 per cent. Victory Bonds in part satisfaction of estate duty on the estate of the late Sir G. W. Fox took place on May 13, 1925, and at that date a sum of 800*l.* had accrued due, but remained unpaid in respect of interest on the said bonds. The 800*l.* was added to the sum of 100,000*l.*, the face value of the bonds, and the bonds were accepted by the Commissioners of Inland Revenue at a total value of 100,800*l.* in part satisfaction of the aforesaid estate duty.

The assessment appealed against was made under Case III. of Sch. D of the Income Tax Act, 1918, on the respondents in the sum of 704*l.*, arrived at as follows:—

Victory Bond interest	800*l.*
War Loan interest	2*l.*
	802*l.*
Less bank interest on overdraft	98*l.*
	704*l.*

The sole question for the opinion of the Court was whether the said 800*l.* was correctly included in the assessment.

On behalf of the respondents it was contended that sub-s. 4 of s. 34 of the Finance Act, 1917, read in conjunction with s. 42 of the Finance Act, 1918, provided the method of arriving at the value of the bonds transferred, and that having arrived at the value nothing in the sub-section made any part of that value income in the hands of the respondents or at all.

On behalf of the Crown it was contended (inter alia) (1.) that by virtue of s. 34, sub-ss. 4 and 5, of the Finance Act, 1917, as amended by s. 42 of the Finance Act, 1918, the interest accrued, namely, 800*l.*, had been credited to the respondents, and was by the terms of the section interest accrued due upon Victory Bonds; (2.) that the respondents were liable to income tax in respect of such interest, and the fact that it had been credited to them as part of a statutory scheme for the surrender of Victory Bonds in satisfaction of death duties did not affect such liability; (3.) that the assessment was correctly made, and should be confirmed.

The Commissioners held that under the terms of s. 34 of the Finance Act, 1917, as amended by s. 42 of the Finance Act, 1918, and under the terms of the prospectus relating to the issue of the 4 per cent. Victory Bonds, transfer of the latter in satisfaction of any amount of estate duty outstanding must be accepted by the Commissioners of Inland Revenue at the face value of the bonds with the addition of any interest accrued but then remaining unpaid at the date of transfer. They further held that sub-s. 4 of s. 34 of the Finance Act, 1917, provided the method for the valuation of the bonds at the date of transfer, and that the interest accrued at that date, but then remaining unpaid, amounting in the present case to the sum of 800*l.*, which was included in and formed part of the valuation, was not income subject to income tax in the hands of the respondents. They accordingly discharged the assessment.

The Crown appealed.

R. P. Hills (*Sir Thomas Inskip S.-G.* with him) for the Crown. The respondents are liable to pay income tax upon

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the accrued interest on these Victory bonds. Sub-sect. 1 of s. 34 of the Finance Act, 1917, provides that any person from whom any sum is due on account of any death duty may pay that sum or any part thereof by means of the transfer to the Commissioners of Inland Revenue of an appropriate amount ascertained as mentioned later in the section of any stock or bonds issued in connection with the war. Sub-sect. 4 provides how the stock or bonds so transferred shall for the purposes of the section be valued—namely, at the price of issue with the addition of any interest accrued due at the date of transfer but then remaining unpaid. Sub-sect. 5 provides that interest is to be deemed for the purposes of the section to accrue from day to day. It is not suggested in this case that if the holder of war stock sells the stock when it is full of interest that he is liable to income tax on so much of the price as represents interest. That point was decided against the Crown in *Wigmore* v. *Thomas Summerson & Sons, Ld.* (1) Here however there is a debt due to the Crown in respect of death duties, and the executors of the deceased person who holds Victory Bonds discharge that debt by the transfer of bonds according to the provisions set out in the statute under which they are credited with two sums of money —namely, the face value of the bonds and in addition with the accrued interest. The addition of the accrued interest is not merely an addition to the value of the bond but is money which is credited to the taxpayer in respect of interest and not as an increase in capital value, and is therefore subject to income tax. Although the crediting of the taxpayer with the interest accrued to the date of transfer is for the purposes of the section, he is nevertheless credited with money received as interest. The interest which is referred to in sub-s. 4 of s. 34 is current interest and not unpaid coupons which could have been cashed.

Cyril King for the respondents. When one looks at the statute and at the findings of the Commissioners in this case no question of interest arises. Under s. 34 of the Finance Act, 1917, the Victory Bonds must be accepted by the

(1) [1926] 1 K. B. 131 ; 9 Tax Cas. 577.

Commissioners of Inland Revenue in satisfaction or part satisfaction of the amount due in respect of death duties, and for that purpose the bonds have to be valued. The accrued interest to the date of transfer which is taken into account in the valuation of the bonds is part of the value of the bonds and not interest, and income tax is not payable in respect thereof. Interest on the Victory Bonds in the ordinary course is payable on the fixed interest days and does not accrue from day to day; the provision in sub-s. 5 of s. 34, that for the purposes of that section interest should be deemed to accrue from day to day, was inserted in order to enable the accrued interest to be taken into account in calculating the value of the bonds. There is a finding by the Special Commissioners that the bonds were accepted by the Commissioners of Inland Revenue as being of the total value of 100,800*l.* in part satisfaction of estate duty, which is fatal to the contention of the Crown here. Further, the Crown say that the executors have been credited with that amount of interest on the Victory Bonds, and that it is equivalent to cash made available to them. But in fact no cash was paid to the executors. This accrued interest was a sum of money to which the executors had no title except in this way, and taxpayers are not made liable to income tax on such an advantage. There is no reference in the statute to any sum being credited to the taxpayer. The due date for payment of the interest had not arrived, and the credit was merely an amount hidden in the value of the bonds and therefore not subject to income tax.

R. P. Hills replied.

ROWLATT J. This is a curious point and also an interesting one, but I agree with the Commissioners. When a person owns a sum in the Funds it increases in value from the day when interest is paid until the next day when interest is paid. Apart altogether from the rise and fall in the market, the element of value of accruing interest is always there, adding to the value of the stock as the interest time wears on—that is clear—and the holder of the stock does not pay income tax

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until the interest becomes due and is paid. If a person dies and part of his estate consists of holdings in the Funds, and his representatives desire to realize them for the purpose of paying death duties, they will get more or less for the stock according as they realize it for the purposes of making such payment at the beginning, or the end, or the middle of the period which intervenes between the two dates when interest is paid. That is quite clear. They would incur by selling the stock at that time no charge for income tax in respect of accrued interest.

The scheme was evolved during the war for making Victory Bonds available to pay death duties at their face value. But then one is immediately confronted with this position, that if nothing more is paid than that, then if the bonds are tendered in payment of death duties immediately after a day when interest is paid, the whole difference between what the bonds could have been sold for in the market and the face value of the bonds is saved to the taxpayer. If, on the other hand, the bonds are tendered in payment of death duties at the end of the interest time, just before the interest is paid, then there is less saved to the taxpayer, because part of the value of the bonds is interest; the bonds have risen in value by the amount of the interest. It seems to me that the machinery contained in s. 34 of the Finance Act, 1917, as amended by s. 42 of the Finance Act, 1918, was designed to put the matter on the same basis as that on which it would have stood if the executors had sold the bonds on the market. If the bonds are sold on the market they are sold for what the principal is worth, and what the accrued interest, if any, is worth. As I have already pointed out, more is obtained if the bonds are sold nearer to the time when the interest is payable than if they are sold earlier. For what is obtained for the principal substitute here the face value of the bonds under the terms of the prospectus. Therefore it is provided in these Regulations that the bonds can be used in payment of death duties at the principal or face value plus the accrued interest, thus bringing it into line with what would happen if the bonds had been sold in the market and had realized that

amount of money, in which case the accrued interest would have been allowed for in the price which would have been obtained for the stock. That is what has been done.

In the present case, however, it is said that that allowance in the value of the bonds which is given by the Government for accrued interest is interest in the hands of the respondents and subject to payment of income tax. I do not think it is. I agree with the Commissioners with regard to this. I have endeavoured to show that I do not think on principle that this accrued interest ought to be subject to income tax for the reasons I have already given, which I will not repeat. I am confirmed in this view when I look at the terms of the statute. Sect. 34 of the Finance Act, 1917, says that the subject may pay any sum due on account of death duties by means of the transfer of an appropriate amount of stock "ascertained as hereinafter mentioned." Then sub-s. 4 says: "Stock or bonds so transferred shall for the purposes of this section be valued at the price of issue with the addition of any interest accrued due at the date of transfer." And s. 42 of the Finance Act, 1918, provides that s. 34 of the Finance Act, 1917, shall have effect as if the words "or such other price as was specified in the conditions subject to which the stock or bonds were issued as the price at which the stock or bonds were to be valued for the purposes of this section" were inserted in sub-s. 4 thereof after the words "price of issue." I think that that means that the value of the Victory Bonds is to be the face value of the bonds plus the accrued interest. What is the accrued interest? There is no way of ascertaining what that is unless it is calculated from day to day, so sub-s. 5 of s. 34 of the Act of 1917 provides that "for the purposes of this section"—that is all—"interest shall be deemed to accrue from day to day." Therefore instead of the representatives of a deceased person who is the holder of 100*l.* Victory Bond going into the market and asking some one: How much will you give for this 100*l.* Victory Bond on which interest is payable, say, six weeks hence?—that is to say there is a certain amount of interest in the market value—instead of doing that, the representatives

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of the deceased person can transfer the bonds to the Commissioners of Inland Revenue in payment of death duties at the face value and the accrued interest: the face value represents the principal value and the accrued interest represents the interest value and the two together are the value at which the bond can be transferred. That is how I read the section; it seems to be in accordance with the principle of the thing.

When I turn to the prospectus of the 4 per cent. Victory Bonds, so far from supporting the contention of the appellant, in my opinion it supports the contention of the respondents, because it says: "Bonds of this issue will be accepted at their face value by the Commissioners of Inland Revenue as the equivalent of cash, with due adjustment on account of interest, in satisfaction of amounts due on account of death duties." "Adjustment" seems to me exactly to describe the very process which I have endeavoured to indicate. It would have been easy to say "at their face value, and there shall also be allowed the interest." What the prospectus says, however, is "with due adjustment on account of interest." That is the value of the bonds is to be altered so as not to make it the face value, but to make it the face value as modified by the accrual of interest, which modification would have taken place, of course, if the bonds had been offered on the market and realized the market price. In my opinion the decision of the Commissioners was right in this case, and therefore the appeal must be dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

R. F. S.

GALE *v.* MOTOR UNION INSURANCE COMPANY.

1926
Nov. 2.

LOYST *v.* GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION.

Insurance—Motor Car—Risk covered by two Policies—Liability—Rateable Contribution.

G. and L. were insured in respect of motor car risks in different companies. L. in driving G.'s car with his consent became liable in damages to a third party. L. in respect of this risk was covered by both policies, but it was provided in each policy (1.) that if the risk was covered by another policy the insurers should not be liable, and (2.) that where two policies covering the risk were in existence the insurers should pay rateably:—

Held, that these two conditions must be read together and that the second qualified the first, and that the proper basis of contribution was that each insurer should pay one-half.

SPECIAL CASE stated by an arbitrator.

The claimant Gale, as trustee for Loyst, and the claimant Loyst on his own behalf, sought an indemnity from the Motor Union Insurance Company (called herein "the Motor Union Company"), and the General Accident, Fire and Life Assurance Corporation (called herein "the Accident Corporation") respectively, in respect of monetary compensation which Loyst had been compelled to pay in consequence of a collision.

Gale was insured under a policy of the Motor Union Company dated September 30, 1924, from August 14, 1924, to August 13, 1925, in respect of his A B C two-seater motor car. The policy contained (inter alia) the following clauses: "Section A. The company shall indemnify the insured or (subject to the provisions of clause 6) any relation or friend driving with the insured's consent against the payment of all sums which they shall become legally liable to pay for compensation in respect of accidents caused by any motor vehicle belonging to the insured and described in the above schedule (*a*) to any third person (including passengers in the car), but excluding any person in the service or household of the insured or of the person driving the car: (*b*) to any property or

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animal belonging to a third person. . . . . Provided always that the due observance and fulfilment of the conditions and qualifications indorsed on this policy shall be a condition precedent to any liability of the company under this policy." The following material conditions were indorsed on the policy: "Condition 6. The extension of the indemnity to friends or relatives of the insured is conditional upon such friend or relative being a licensed and competent driver and not being insured under any other policy. . . . ." "Condition 10: If at the time of the happening of any accident, injury, damage or loss covered by this policy, there shall be subsisting any other insurance or indemnity of any nature whatsoever covering the same, whether effected by the insured or by any other person, persons or firm, then the company shall not be liable to pay or contribute to any such damage or loss more than a rateable proportion of any sum or sums payable in respect thereof for compensation."

Loyst was insured with the Accident Corporation in respect of his Morris Cowley motor car from October 31, 1924, to October 30, 1925, under a policy dated November 3, 1924. The policy (inter alia) contained the following provisions: "The corporation will, subject to the terms, conditions and limitations contained herein and of any indorsement hereon, indemnify the insured his executors and/or administrators in respect of any car described in the schedule against . . . . Clause 2 (1.) All sums which the insured shall become legally liable to pay in respect of any claim by any person (including passengers in the car) for loss of life or accidental bodily injury or damage to property (including animals) caused by through or in connection with such car and in addition the law costs payable in connection with such claim when incurred with the consent of the corporation. (2.) The insured will also be indemnified hereunder whilst personally driving a car not belonging to him provided the insured's own car is not in use at the same time, and provided that there is no other insurance in respect of such car whereby the insured may be indemnified." The following was among the conditions indorsed on the policy: "Condition 5. If

at the time of the occurrence of any accident loss or damage there shall be any other indemnity or insurance subsisting whether effected by the insured or by any other person the corporation shall not be liable to pay or contribute more than a rateable proportion of any sums payable in respect of such accident, loss or damage . . . . the due observance and fulfilment of the provisions and conditions of this policy . . . . shall be a condition precedent to any liability of the corporation to make any payment under this policy." On April 4, 1925, Loyst, with Gale's consent, was driving the A B C two-seater motor car belonging to the latter. He collided with a motor cyclist. The latter recovered from Loyst 93*l.* 17*s.* 4*d.* damages and 60*l.* 2*s.* 11*d.* costs in the Brentford county court in respect of this collision. Loyst paid both these sums personally since liability in respect thereof was disclaimed by both companies, each maintaining that the other company was liable. Eventually each claimant claimed against the two insurance companies respectively, Gale as trustee for Loyst, and Loyst on his own behalf, and the matter went to arbitration. For the claimants it was contended that one or the other of the policies covered Loyst, who should be indemnified by the one so far as he was not by the other. That having regard to condition 10 of the Motor Union Company's policy and condition 5 of that of the Accident Corporation the two insurers were liable to contribute rateably to the full indemnity, and in proportion to the insured values of the two cars, that is to say, 120*l.* in the case of the A B C car, and 150*l.* in that of the Morris Cowley, it being eventually agreed that the proportion (if so payable) should be one-half each. For the Motor Union Company it was contended that any provision extending the right of indemnity to any other person than the person to whom the policy was issued must be interpreted strictly, and that Loyst being insured under another policy, was not covered by their policy. It was also contended that there could be no liability of both companies. On behalf of the Accident Corporation it was contended that the liability of one insurer excluded that of the other, and that the rateable

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contributions condition in the policies did not apply. It was also contended that clause 2, sub-clause 2, of the policy only provided for another car than that insured if there was no other insurance on that other car.

The arbitrator held that the liability of one insurer excluded liability of the other, and that the conditions in both policies as to rateable proportions did not apply; that Loyst satisfied the requirements of condition 6 of the Motor Union Company's policy, and that therefore Gale, as trustee for Loyst, was entitled to be indemnified by the Motor Union Company in respect of all pecuniary loss suffered by Loyst in consequence of the collision of April 4, 1925. Loyst's claim against the Accident Corporation failed. The question for the Court was whether the award was correct in law.

Blanco White and *E. Hancock* for the claimants.

Montgomery K.C. and *Wallington* for the Motor Company.

Le Quesne K.C. and *Hilbery* for the Accident Corporation.

[*Williams* v. *Baltic Insurance Association of London* (1) was referred to.]

ROCHE J. stated the facts as set out above and continued: The terms of these policies are not so clearly expressed as they might be, and have naturally given rise to disputes. The substance of the disputes is whether both the companies are liable or neither is liable or one of them is liable alone. Each insurance company denies liability, and the arbitrator decided that the Motor Union Company was solely liable.

It was contended on behalf of the claimants before me that both of the defendant companies were liable rateably, and in my opinion that is the right view to take. In looking at the two material clauses of the Motor Union Company's policy, one must, in my opinion, read them together as relating to, explaining and qualifying one another. Condition 5 of the Accident Corporation's policy, though not precisely in the same terms, is substantially to the same effect as condition 10 of the Motor Union Company's policy. It is conceded by

(1) [1924] 2 K. B. 282.

counsel for the Motor Union Company that in construing condition 6 the words, "not being insured under any other policy," must be taken to mean, "not being covered against the risk in question under any other policy"; and the real effect of his argument is, not that the Motor Union Company is not liable at all, but that the liability is a liability to be shared rateably with the Accident Corporation. He further contended that upon the proper construction of clause 2, sub-clause 2, of the Accident Corporation's policy it meant the same as condition 6 of the Motor Union Company's policy; that it limited the indemnity granted to Loyst while he was personally driving some other car to cases where he had not an indemnity from anybody else, meaning thereby a full indemnity. It was said on behalf of the Accident Corporation that the words "whereby the insured may be indemnified" substantially add nothing, except that they make more forcible the conclusion which ought to be drawn from the rest of clause 2, sub-clause 2—namely, that it is a provision that Loyst will be indemnified only if he is driving an uninsured car. In my judgment there is nothing in the sub-clause which justifies that conclusion. The words, "whereby the insured may be indemnified," do not allude to a possible or contingent or partial indemnity. The whole clause means in my judgment "provided there is no other insurance in respect of such other car under which the assured might secure an indemnity, meaning a full and complete indemnity in the existing circumstances." In other words if the assured is completely protected elsewhere by insurance then he is not to be entitled to recover under these policies or either of them. But in cases where these policies provide for a proportionate or partial indemnity neither gives a full indemnity or complete protection. Accordingly upon the true construction of these various clauses the assured is not deprived of the indemnity altogether, which would be the result if condition 6 of the Motor Union Company's policy and clause 2, sub-clause 2, of the Accident Corporation's policy stood alone. The provision as to rateable contribution qualifies and explains the

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preceding clause negativing liability. In my opinion the proper award in this case is that the claimants should be paid rateably in respect of this accident by the Motor Company and the Accident Corporation. It is agreed that rateably in the circumstances means that each company pays half. I, therefore, direct that each of the respondents shall pay to the claimants the amount awarded by the arbitrator in equal moieties.

Appeal allowed.

Solicitors for claimants: *T. & N. Blanco White.*

Solicitors for Motor Insurance Company: *A. D. Vandamm & Co.*

Solicitors for General Accident Assurance Corporation: *Joynson-Hicks & Co.*

W. L. L. B.

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July 19.

DAVIES *v.* DAVIES.

Costs—County Court—Remitted Action—Scale of Costs—Scale applicable to Amount recovered—Power of County Court Judge to order Costs on a higher Scale—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 119—*County Courts Act*, 1919 (9 & 10 *Geo.* 5, *c.* 73), *s.* 12.

Sect. 12 of the County Courts Act, 1919, does not empower a county court judge to award to a plaintiff in a remitted action costs on a scale higher than that applicable to the amount recovered without giving a certificate in accordance with the provisions of s. 119 of the County Courts Act, 1888.

APPEAL from Hereford County Court. (1)

The action was commenced in the High Court. The plaintiff claimed a sum of 84*l.* 12*s.* 10*d.*, the balance of an account. The action was remitted to the county court. The defendant paid 25*l.* into Court and filed a defence and counterclaim. The action was referred to the registrar to take accounts, and he found that a further sum of 33*l.* 15*s.* 8*d.* was due from the defendant to the plaintiff. The county court judge gave judgment for the plaintiff for that amount,

(1) Atkin and Lawrence L.JJ. were sitting as a Divisional Court.

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and ordered the defendant to pay the costs of all the proceedings on Scale C. (1)

The defendant appealed against so much of the judge's order as related to costs.

Bosanquet K.C. (*Raglan Somerset* with him) for the defendant. Before the County Courts Act, 1919, costs in remitted actions were governed by s. 65 of the Act of 1888, which gave the county court judge no discretion as to costs incurred before the transfer. The object of s. 12 of the Act of 1919 was to give the county court judge power to deal with all costs, but it gives him no power to order costs on a scale higher than the one applicable unless he gives a certificate in accordance with s. 119 of the Act of 1888, which is not repealed. The two Acts are to be construed as one.

[He referred to *Kutner* v. *Phillips*. (2)]

[He was stopped.]

Neilson K.C. (*Graham Mould* with him) for the plaintiff. Sect. 12 of the Act of 1919 specifically gives the county court judge power to make such an order as the present. Sect. 119 does not prohibit him from making an order for costs on a higher scale without giving a certificate. It is an enabling, not a prohibitive section. That appears to be the view taken in the Annual County Courts Practice, 1927,

(1) Sect. 119 of the County Courts Act, 1888: "The judge may award costs on any scale higher than that which would be otherwise applicable to the plaintiff on any amount recovered, however small, or to a defendant who successfully defends an action for any amount, however small, provided that the said judge certifies in writing that the action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons, or of general or public interest."

Sect. 12 of the County Courts Act, 1919: "Where an action . . . . is transferred or removed from the High Court to a county court . . . . or from one county court to another county court, the costs of the whole proceedings both before and after the transfer or removal shall, subject to any order made by the court which ordered the transfer or removal, be in the discretion of the court to which the matter is transferred or removed, and that court shall have power to make orders with respect thereto and as to the scales or columns on or under which the costs of the several parts of the proceedings are to be taxed, and the costs of the whole proceedings shall be taxed in that court. . . . ."

(2) [1891] 2 Q. B. 267.

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p. 1069, and it is supported by the judgment in *Gold Brothers & Nash, Ld.* v. *Fuller*. (1)

[He also cited *Jenkins & Co.* v. *Simon* (2) and *Hawkins* v. *Miln*. (3)]

ATKIN L.J. This was an action in the High Court which was remitted to the county court. When the case was tried in the county court, the county court judge, after a reference to the registrar as to the state of the accounts between the parties, held that the plaintiff was entitled to recover a sum of 33*l*. 15*s*. 8*d*. from the defendant. He gave judgment for the plaintiff for that amount and ordered the defendant to pay costs on Scale C. It is said that the learned judge had a complete discretion to award costs on any scale he pleased. On the other hand it is contended that he is limited in his discretion by reason of s. 119 of the County Courts Act, 1888. [His Lordship read s. 119 and continued:] It is plain that in the ordinary course the county court judge is bound to give a certificate under s. 119, otherwise the costs of the plaintiff are according to the amount recovered. Now we have to deal with a remitted action under s. 65. Under that section costs were not in the discretion of the county court judge so far as they arose in the High Court. The Act of 1919 altered the procedure, and by s. 12 gave a discretion to the county court judge. That section includes the costs in remitted actions. [His Lordship read the section and continued:] It is said that the discretion given by that section is general and unrestricted. I cannot accept that view. The object of the section was to determine who was to exercise the discretion. It was not intended to give the county court judge larger or further powers. That is clear from the insertion of the words "from one county court to another county court." Take the case of a plaint filed in the wrong court. It would be anomalous that in such a case the Act should give a wider or larger discretion to the judge to whose court the action was transferred. It was

(1) [1925] W. N. 264. (2) [1926] 1 K. B. 111.
(3) [1921] 3 K. B. 633.

not intended that the transferee should have a wider discretion as to costs, but that he should have jurisdiction over a larger subject-matter. This does not mean that the judge has not the same discretion as was given in s. 113 to order taxation on a lower scale, but that in ordering costs on a higher scale than that applicable, he must give a certificate under s. 119 of the principal Act. The county court judge therefore made a mistake in ordering costs on Scale C without giving such a certificate. *Gold Brothers & Nash, Ld.* v. *Fuller* (1) was referred to. I think that in that case both Bankes L.J. and I were dealing with the discretion to order costs on a lower scale. I certainly had no idea of dealing with the question of a higher scale. It is right that in the county court the restriction on increasing costs should be maintained. To my mind the discretion of the county court judge is limited by the provisions of s. 119 of the Act of 1888. The order awarding costs on the C scale must therefore be set aside.

LAWRENCE L.J. I agree. It is plain to my mind that the main object of s. 12 of the Act of 1919 was to give to the judge to whom the action is transferred the same power over the costs incurred before the action was transferred to him as he has over costs in his own court. It is said that the words of s. 12 give to the county court judge a general and unfettered discretion. That to my mind is erroneous. Sect. 12 must be construed with s. 119 of the principal Act. I think that the county court judge came to a wrong conclusion as to the effect of s. 12. His discretion can only be exercised in accordance with s. 119 of the earlier Act.

Appeal allowed.

Solicitors for the appellant: *Taylor, Rowley & Co., for David Allen & Carver, Hereford.*

Solicitors for the respondent: *Walls, Stallard & Co., for T. A. Matthews, Hereford.*

(1) [1925] W. N. 264.

F. C.

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Oct. 13, 14.

BELL AND ANOTHER *v.* HARKER.

Insurance (Industrial)—Insured Person—Transfer—Person holding several Policies in Each of two Societies—Transfer of one Policy from one Society to the Other—Co-existence of lapsing and substituted Policies—Industrial Assurance Act, 1923 (13 & 14 *Geo.* 5, *c.* 8), *s.* 26, *sub-s.* 1, *s.* 39.

The Industrial Assurance Act, 1923, s. 26, sub-s. 1, provides: "A member of or person assured with a collecting society or industrial assurance company shall not . . . . be transferred from the society or company in which he was so assured so as to become or be made a member of or be assured with any other such society or company" otherwise than as therein provided:—

Held, that, where a person allows a policy with a society of that description to lapse and takes out instead of it a similar policy in another society, a transfer takes place within the contemplation of the sub-section, notwithstanding that before the date of the policy with the second society the person already held other policies with that society, or that after that date he continues to hold other policies in the first society, or that before the lapse of the earlier policy the two policies for a time co-exist.

Pearl Life Assurance Co. v. *Scottish Legal Life Assurance Society* [1901] 1 K. B. 528 and *Salvation Army Life Assurance Society* v. *British Legal Life Assurance Co.* 1908 S. C. 1138; 45 Sc. L. R. 843 applied.

CASE stated by justices for the county borough of Stockport.

An information and complaint was preferred by Harold Parkinson Harker (hereinafter called "the respondent") under the Industrial Assurance Act, 1923 (1), against Ethelbert Bell and T. Heaward (hereinafter called "the appellants"), for that they were guilty of an offence under s. 39 of the Act in that they were unlawfully concerned in the transfer of Annie Parkinson, a member of the British Empire Collecting Society, a collecting society carrying on industrial assurance business, so that she became assured with the Royal London Mutual Insurance Society, Ld., an industrial assurance company, without the written consent of the said Annie Parkinson (hereinafter called "Mrs. Parkinson"), in the form prescribed by s. 26 of the Act and the regulations made thereunder. The particulars following were appended to the information and complaint—namely, that Mrs. Parkinson lived at 19 Stanhope Street, Stockport; that the policies

(1) The relevant provisions of the Act are set out below in the judgment of Lord Hewart C.J.

concerned in the charge were policies by the British Empire Collecting Society and the Royal London Mutual Insurance Society, Ld., respectively, assuring the life of John Parkinson for a premium of threepence a week.

The information was heard by the justices on March 15, 1927.

At the hearing of the information one witness only was called—namely, the said Mrs. Parkinson, the wife of Christopher Parkinson, who attended on Crown Office subpœna. The documents produced or referred to at the hearing were admitted by the appellants' solicitor without formal proof, and a list of them was annexed to the case. The following facts were proved or admitted at the hearing :—

(1.) Before and on April 26, 1926, Mrs. Parkinson held policies in the British Empire Collecting Society, including a policy No. 15818, on the life of her son John, in respect of which the sum of 9*l.* 9*s.* was payable on his attaining the age of sixteen years at a premium of threepence per week. That policy was taken out on April 29, 1918. (1) The premiums

(1) The policy dated April 29, 1918, in the British Empire Collecting Society, after reciting that application had been made by "the assured" to grant an assurance, provided that, if the premiums were duly paid, then the society should, in the event arising as provided, pay the assurance money; and that the production by the society of the policy after the amount had been paid, together with a receipt signed by an executor or administrator, husband or wife, or a relative of "the assured" for the sum assured should be conclusive evidence that that sum had been duly paid. In the indorsement on that policy a space was reserved for the "Name of Assured," in which was written the name of John Parkinson; and a space was reserved for the "Name of Proposer," in which was written the name of Annie Parkinson.

The policy dated April 26, 1926, in the Royal London Mutual Insurance Society, Ld., provided that, in consideration of the person named in the first column of the Schedule thereto (thereinafter designated "the proposer") not having made any untrue representation respecting the person named in the second column of the Schedule (thereinafter designated "the life assured") and having proposed to pay the premiums, it was agreed by the society that, if the proposer should duly pay the premium, the funds of the society should be liable to pay to "the proposer, his or her executors, administrators or assigns" the amounts specified; and that the production by the society of a receipt signed by an executor, administrator, husband or wife, or a relative of "the proposer" should be conclusive evidence that that sum had been duly paid. In the first

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on that policy were collected by Mrs. Bell, the wife of the appellant Ethelbert Bell, who had not himself collected any premiums.

(2.) The last premium paid in respect of that policy was paid on April 19, 1926. Some weeks elapsed before Mrs. Parkinson received from the British Empire Collecting Society a lapse notice. That policy lapsed on June 10, 1926, on twenty-eight days' notice.

(3.) Mrs. Parkinson stopped paying the premiums on the British Empire Collecting Society's policies because she was dissatisfied with them through having seen a derogatory report of that society in a newspaper.

(4.) On February 22, 1915, Mrs. Parkinson had taken out a policy on the life of her son John in the Royal London Mutual Insurance Society, Ld., which was in force on April 26, 1926.

(5.) Mrs. Parkinson on August 11, 1913, had taken out two other policies in the same company on the lives of herself and a William Bywater respectively, which with a larger number of other policies subsequently taken out by her in the same company were on April 26, 1926, in force.

(6.) The appellant, Ethelbert Bell, called on Mrs. Parkinson shortly before April 26, 1926, and asked her if she would give him some new business, as he was taking a book of the Royal London Mutual Insurance Society, Ld., and asked if he might bring the superintendent of that company to talk it over with her husband.

(7.) On April 26, 1926, both the appellants called, when the appellant Heaward told Mrs. Parkinson that the policies in the British Empire Collecting Society could not be transferred, of which Mrs. Parkinson said she was aware, and said she had decided to give him new business. She thereupon signed a proposal form assuring her son John in the Royal London Mutual Insurance Society, Ld. She also signed a

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column of the Schedule to that policy headed "Name and Description of Proposer" was written the name of Annie Parkinson; and in the second column headed "Name and Description of Life Assured" was written the name of John Parkinson.

number of other proposal forms in the same company. The proposal form for assuring her son John in the Royal London Mutual Insurance Society, Ld., was filled up by one or other of the appellants, the particulars being supplied by herself. The policy assuring her son John in the British Empire Collecting Society was not then produced and was not at any time handed to the appellants or either of them. Mrs. Parkinson could not say why question fourteen in the proposal forms as follows: "Do you, or does any other person to your knowledge hold a policy on this life issued by any other office? If so, give particulars hereunder. If none, state 'Nil,'" was not answered. She did not pay the premiums on the new policies in the Royal London Mutual Insurance Society, Ld., that day, but did so later in the same week.

(8.) The new policy was for the sum of 6*l.* 15*s.* payable at the expiration of ten years if her son John was then living at a premium of threepence per week. (1)

(9.) Mrs. Parkinson could not remember whether she signed any other proposal forms nor could she say whether she signed a form similar to the form then shown to her. The form then shown to her was a print of the Industrial Assurance (Individual Transfer) Regulations, 1923, dated December 11, 1923 (No. 1495 of 1923 Statutory Rules and Orders), containing the prescribed form of consent under s. 26 of the Industrial Assurance Act, 1923.

A preliminary objection was taken by the appellants' solicitor that under s. 11 of the Summary Jurisdiction Act, 1848, the information should have been laid within six calendar months from the time when the matter of complaint arose—namely, within six months after April 26, 1926—and that sub-s. 5 of s. 39 of the Industrial Assurance Act, 1923, under which proceedings for offences under that Act could be commenced at any time within a year, only applied to collecting societies and not to industrial insurance companies. The justices in overruling the objection ordered a note thereof to be made.

(1) See note (1) ante, p. 369.

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The appellants' solicitor submitted there was no case to answer and did not call any evidence. He contended :—

(*a*) That s. 26, sub-s. 1, of the Industrial Assurance Act, 1923, under which the information was laid, had no application to the present case, inasmuch as Mrs. Parkinson and her son John were at the date of the alleged offence, to wit on April 26, 1926, and had for many years before and before the issue of the policy in the British Empire Collecting Society been members of and insured with the Royal London Mutual Insurance Society, Ld., with whom the new policy was effected, and that there was no transfer of a member in the British Empire Collecting Society, and the policy therein lapsed in consequence of Mrs. Parkinson ceasing to pay the premiums payable in respect thereof. The appellants' solicitor further contended that there was no transfer of agency, the appellant Bell not having been proved to have collected any premiums from Mrs. Parkinson in respect of the policy issued by the British Empire Collecting Society on the life of her son John on April 29, 1918.

(*b*) That s. 26, sub-s. 1, of the Act did not apply to the transfer of a policy only, and in any event there was no evidence of such transfer.

The respondent's solicitor referred to *Pearl Life Assurance Co.* v. *Scottish Legal Life Assurance Society* (1), and contended that the decision in that case disposed of the appellants' contention, and that there was a transfer of a person assured with one company to another company within the meaning of the section.

The justices, being of opinion that there had been a transfer of a person assured with one company to another company without the written consent of the assured, and that the appellants were officers of the company to which the assured person had been transferred and were concerned in such transfer, convicted the appellants, and fined each of them 10*s.*, and ordered them to pay the witnesses' expenses and 5*l.* 5*s.* special costs.

The question for the Court was whether, upon the above

(1) [1901] 1 K. B. 528.

statement of facts, the justices came to a correct determination and decision in point of law.

A. F. Engelbach (*J. B. Matthews K.C.* with him) for appellants. The appellants did not contravene the provisions of the Industrial Assurance Act, 1923, s. 26 (1), by reason of the part they took in the transactions by which Mrs. Parkinson, without her written consent having been obtained under that section, ceased to hold the policy on the life of her son in the British Empire Collecting Society (2), and became on April 26, 1926, the holder of a policy on his life in the Royal London Mutual Insurance Society, Ld. (2) These transactions did not amount to a "transfer" within the meaning of the section either of Mrs. Parkinson as a member of or person assured with the British Empire Society to the Royal London Society, or of the policy on the life of her son in the former society from that society to the latter society. Before April 26, 1926, she had already decided to allow the policy in the British Empire Society to lapse and had paid her last premium on that policy, and by abandoning that policy and taking out on that date another somewhat similar policy in the Royal London Society she did not effect any transfer of the policy in the former society from that society to the latter society. The policy in the British Empire Society did not in fact lapse until after the policy in the Royal London Society had been taken out, so that the two policies co-existed for a time, and for that reason also there was no transfer of the policy. Again, these transactions did not effect a transfer of Mrs. Parkinson from the British Empire Society to the Royal London Society "so as to become or be made a member of or be assured with" the latter society within the meaning of the section, because before the date of these transactions she was already a member of or assured with the latter society by holding policies in that society. Further, these transactions did not effect a transfer of Mrs. Parkinson as a "member of or person

(1) The relevant provisions of the Act are set out below in the judgment of Lord Hewart C.J.

(2) See note (1) ante, p. 369.

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assured with " the British Empire Society within the meaning of the section, inasmuch as after the date of these transactions she remained a member of or person assured with the former society by continuing to hold other policies in that society. Even apart from the fact that she continued to hold other policies in the British Empire Society, the transactions did not cause her transfer as a member of or person assured with that society from that society to the Royal London Society, because the policy on the life of her son in the former society did not constitute her a member of or person assured in that society. It appears from that policy that she was merely the proposer for it, and that her son was the person assured by it and the member of the society. The contract of assurance is not made with her but with her son. It is not she but the legal representatives or relatives of her son who have the right to recover the premiums or policy moneys. On the true construction of that policy Mrs. Parkinson was not a member of or person assured with the British Empire Society, and therefore she could not be transferred from it.

[*Giveen.* This point was not taken on behalf of the present appellants in the court below, and it cannot therefore be taken in this court. If it had been taken in the court below, evidence could have been brought to show that Mrs. Parkinson is registered as a member of the British Empire Society.]

The point arises on the findings of the justices and on the construction of the policy which is before the Court. The Act of 1923 is a penal enactment imposing penalties upon collectors, and it ought to be strictly construed.

Giveen for the respondent. The appellants contravened the Industrial Assurance Act, 1923, s. 26, by being concerned in the transactions in question when the provisions of that section had not been complied with. These transactions constituted a " transfer " within the meaning of the section. The Act must be read in the light of the purposes for which it was passed—namely, to prevent the insurance from being forfeited for non-payment of the premium without notice; to prevent the insurance from being transferred to another society without the written consent of the insured: and

to prevent troublesome canvassing by agents: see *Salvation Army Life Assurance Society* v. *British Legal Life Assurance Co.* (1). The words of the Act should therefore be understood not in their narrow sense as terms of art, but in their ordinary and popular sense. In particular the term "transfer" in s. 26, sub-s. 1, is used as meaning not a strict legal assignment, but a removal by any means of the insured person's interest from one society to another. The term as there used cannot refer to a formal assignment or conveyance, as that could not in any case be effected without the consent of the assignor. The transfer prohibited by the sub-section is that of a member of or person assured with a society, but it is obvious that these words cannot be taken in their strict literal sense as referring to a transfer of the person or individual who is never in the possession of the society, and that they can refer only to a transfer of certain legal rights and duties existing as between the person and the society. The term "transfer" as used in the Act applies to a case, like the present case, in which a person who holds several policies in each of two societies removes one of them only from the one society to the other: *Salvation Army Life Assurance Society* v. *British Legal Life Assurance Co.* (1); and to a case, also like the present, in which the new policy in the one society is taken out before the lapse of the policy in the other society, so that for a time the two policies co-exist: *Pearl Life Assurance Co.* v. *Scottish Legal Life Assurance Society* (2); and *Salvation Army Life Assurance Society* v. *British Legal Life Assurance Co.* (1) The facts in the latter of these cases were substantially similar to those in the present case, and the decision in that case, though in no way binding upon this Court, should be followed here. It may be that the transaction contemplated by s. 26 of the Act of 1923 would have been better described by the term "substitution" than by the term "transfer." The justices have found that Mrs. Parkinson allowed the policy in the British Empire Society to lapse, and took out the policy in the Royal London Society with the intention that the latter

(1) 1908 S. C. 1138; 45 S. L. R. 843. (2) [1901] 1 K. B. 528.

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policy should take the place of the former, and that the transaction was in effect a substitution for her interest in the one policy of her interest in the other policy, and there was evidence to support their findings. There was therefore here in fact a transfer within the meaning of the Act. According to the view presented on behalf of the appellants, if a person held a large number of policies in a society, the collector of another society who induced him to effect transfers which did not comply with the Act of all but one of these policies would not contravene the Act, and the Act would thus in effect be rendered nugatory. The contention that the policy which Mrs. Parkinson took out in the British Empire Society on the life of her son did not constitute her a member of or person assured with that society, was not raised in the court below, as has already been pointed out, and, further, it is not well founded, because the justices have found that she was in fact a member of that society as well as her son.

[LORD HEWART C.J. The Court does not require further argument on that point.]

LORD HEWART C.J. This is a case stated by justices for the county borough of Stockport. The question arises out of an information preferred by the present respondent against the present appellants under the Industrial Assurance Act, 1923. The complaint was that the appellants were guilty of an offence under that Act in that they were unlawfully concerned in the transfer of Annie Parkinson, a member of the British Empire Collecting Society, a collecting society carrying on industrial assurance business, so that she became assured with the Royal London Mutual Insurance Society, Ld., an industrial assurance company, without the written consent of the said Annie Parkinson in the form prescribed by s. 26 of the Act, and the Regulations made under it. In the result the justices convicted the appellants, and imposed a small fine upon each of them, and ordered them to pay certain expenses and special costs. It is against that conviction that the appellants now appeal

by a case stated, and the question for this Court is whether upon the facts the justices came to a correct determination in point of law.

It is not necessary, I think, to repeat all the facts which are carefully set out in this well stated case. It is enough to refer to some of them. [His Lordship stated the facts so far as necessary and continued:] Those being the material facts, the justices had to decide whether it was proved that the offence charged had been committed, and their task was the very usual task of ascertaining the true nature of the transaction as distinguished from its superficial form. What is the offence which is referred to? Sect. 39, sub-s. 3, of the Act of 1923 provides: "If any collector of a collecting society or industrial assurance company, or any other person, contravenes or fails to comply with any of the provisions of this Act affecting such collector or other person, he shall be guilty of an offence under this Act and liable on summary conviction" to a certain penalty. The section under which the offence here charged was said to have been committed is s. 26, and that section is concerned with what are called transfers from one society or company to another. Sub-sect. 1 of that section provides as follows: "A member of or person assured with a collecting society or industrial assurance company shall not," except in cases which for the present purposes are not material, "be transferred from the society or company in which he was so assured so as to become or be made a member of or be assured with any other such society or company without his written consent, or, in the case of an infant, without the like consent of his parent or other guardian, and any society or company and any collector or other officer of any society or company concerned in such a transfer shall, if the provisions of this section are not complied with, be deemed to have contravened the provisions of this Act." That sub-section having made obligatory a consent in writing, sub-s. 2 proceeds to provide that that consent "shall be in the prescribed form and shall have annexed thereto a document in the prescribed

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form to be furnished by the society or company to which the transfer is to be made setting out the terms of and rights under the existing policy, and the terms of and rights under the policy to which the assured will become entitled on transfer and the consideration (if any) which has been or is to be paid for the transfer, and the person to whom such consideration has been or will be paid." Sub-sect. 3 then provides: "The society or company to which the assured is sought to be transferred shall furnish to the person by whom such consent as aforesaid is signed a copy of such consent and of the document annexed thereto, and shall, within seven days from the date when such consent is signed, give to the society or company from which the assured is sought to be transferred notice of the proposed transfer containing full particulars of the name and address of the assured and the number of his policy, together with such consent as aforesaid, and the document annexed thereto," and then follow consequential provisions in sub-s. 4. The section, therefore, is obviously dealing with insurance companies or collecting societies of this particular kind, and with what it calls transfers from one society or company to another. It is to be observed that the section begins by drawing a distinction between two sets of cases. The transfer may be a transfer of a member of one society to another society, or it may be a transfer of a person assured with one society to another society. In other words, the transfer may be a partial transfer or it may be a complete transfer; it may be a change of membership or it may be the substitution in effect of one policy for another. Where these transfers or substitutions or changes are to be made the Act provides that they shall only be made subject to certain exceedingly strict provisions. The various reasons for this legislation are obvious. Several of these reasons were referred to in the case of the *Salvation Army Life Assurance Society* v. *British Legal Life Assurance Co.* (1) In that case Lord Low said: "I imagine that the main object of that enactment is to protect persons

(1) 1908 S. C. 1138; 45 S. L. R. 843.

insured against the solicitations of collecting agents of such societies or companies. I suppose that such agents are paid by results, and that therefore the interest of each agent is to obtain as much business as possible for the society or company which he represents." (1) The Lord Justice Clerk, in his judgment, referred specifically to another obvious mischief. He said that one evil against which the small insurer in industrial insurance organizations had to be protected was that the companies, or societies, had to be restrained from cutting off the insured from the benefit of the insurance, and so holding past premiums, while getting rid of their obligation. (2)

In the present case in the court below two points were taken. It was urged, first, that s. 26, sub-s. 1, of the Act of 1923, did not apply for the reason that on April 26, 1926, Annie Parkinson and her son John were, and had for some time been, members of and insured with the new society, the Royal London Mutual Insurance Society, and that, therefore, there was on that date no transfer of either of them to that society. Secondly, it was urged that the section did not apply to the transfer of a policy only, as distinguished from the transfer of a member. Those were the arguments, and the only arguments, adduced in the court below. It has been attempted, in accordance with a not uncommon practice, to raise another point in this court—namely, the point that in the information Mrs. Parkinson is spoken of as a member of the British Empire Collecting Society, whereas in fact she was not a member of that society. But the case finds again and again that she was a member of that society, and held policies therein. Moreover, this point was not open to the appellants on this case as it is stated.

With regard to the two contentions that were raised in the court below it seems to me that they are clearly disposed of by the combined effects of two cases which have already been decided. One of these cases is *Pearl Life Assurance Co.* v. *Scottish Legal Life Assurance Society* (3) where, upon facts not

(1) 1908 S. C. 1144. (2) 1908 S. C. 1146.
(3) [1901] 1 K. B. 528, 530.

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entirely but to some extent, the same as those in the present case, Wills J. said: "The Act of Parliament is not very artificially drawn. Probably the language used is understood by the class of persons who are most concerned with dealings under the Act; but, however this may be, it is clear that the language used in the Act is popular rather than artificial. One knows that frauds are frequently perpetrated in transactions of this kind, and s. 4"—that is to say, s. 4 of the corresponding Act of the year 1896—"is intended to check the proceedings of the people who carry out these frauds. The first check is imposed by sub-s. 1: in order that there may be evidence of a transfer, the written consent of the person to be transferred is required." (1) Phillimore J., in giving judgment to the same effect, said that the clause was strange, and strangely worded. In that case it was argued with success, that notwithstanding that the old policy overlapped the new one so that the two policies were for a brief period co-existent, nevertheless that which had taken place was a transfer.

That case was followed, and indeed, supplemented by, the Scottish case already referred to—*Salvation Army Life Assurance Society* v. *British Legal Life Assurance Co.* (2), where, as in the present case, the member had insurances in both societies. In that case Lord Stormonth-Darling used these words: "It is always desirable that in the construction of an imperial statute the Courts of the two countries should speak with the same voice, though a Scottish Court may not, strictly speaking, be bound by the decision of an English one. Now, the only case in which this statute has been construed in England is that of the *Pearl Life Assurance Co.* (3) There an alderman of the City of London had held that there was no transfer, or seeking to transfer, where no two insurances had been shown to co-exist. But a Divisional Court (Wills and Phillimore JJ.) reversed his decision, holding that there was a seeking to transfer in the sense of the Act." (4) In that Scottish case also,

(1) [1901] 1 K. B. 530.
(2) 1908 S. C. 1138; 45 S. L. R. 843.
(3) [1901] 1 K. B. 528.
(4) 1908 S. C. 1143; 45 S. L. R. 847.

as Lord Stormonth-Darling pointed out, there was a co-existence for a short time of two insurances substantially securing the same benefits in return for the same contributions, although the persons concerned in the transactions may not have known, or intended it. It seems to me that the effect of these two cases is to cover the present case.

Indeed, apart altogether from any such decisions as these, and on the construction of the provisions of the Act itself, it would seem that there was here an effective transfer. Looking at the words of the sections in question, whether they be truly described as "strange" or as "popular," bearing in mind the notorious mischiefs which this Act was intended to meet, and having regard to the distinction which is drawn at the outset of s. 26 between a member on the one hand, and a person assured with one of these insurance societies on the other hand, I think it is plain that the transfer is complete, whether it be a transfer of a member as such, or a transfer of a particular policy, and that it matters not that before the transaction has taken place the member is a member of both of the societies in question, or has policies in both of them. What is being dealt with is the individual transaction, whether it affects the member in his membership as a whole, or is limited to a particular policy. The Act provides that the individual transaction, whether it be called a transfer, or a substitution, or a change, shall be carried out in so formal a manner, subject to necessary notices, as to prevent the kind of evil which the Act was brought into existence in order to meet. I cannot see any reason whatever for the contention that the mischief contemplated does not arise, and the Act does not apply, where that which is transferred is not the whole but a part of the whole, not all the policies but some or one of them, not the member qua member but the policy qua policy. If that were the true interpretation of this statute it seems to me that it would easily be rendered nugatory. Indeed, counsel for the appellants had to go so far as to say that the Act would not apply where a person having twenty-seven policies in a society transferred only twenty-six of them, retaining the

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twenty-seventh so as not to cease to be a member of that society. That contention, with great respect to the argument as a whole, seems to me to be almost ludicrous, and I cannot find any support in the vocabulary of this Act for the view that that is what the Legislature intended. I, therefore, think that this appeal fails, and ought to be dismissed.

AVORY J. I am of the same opinion. For the purpose of my judgment I assume that Mrs. Parkinson was a member of, and a person assured with, the British Empire Collecting Society. The only question which then remains is whether there was evidence upon which the justices could find that there was a transfer within the meaning of s. 26 of the Industrial Assurance Act, 1923. Having regard to the two authorities to which my Lord has referred I have come to the conclusion that there was evidence upon which the justices could find that the circumstances of this case constituted a transfer within the meaning of that section. I therefore agree that the appeal should be dismissed.

SALTER J. I agree.

Appeal dismissed.

Solicitors for appellants: *Wilberforce, Allen & Bryant.*
Solicitor for respondent: *The Treasury Solicitor.*

J. R.

[IN THE COURT OF APPEAL.]

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Revenue—Income Tax—Settlement—Income from Fund accumulated for Benefit of Person entitled on Contingency—Beneficiary having Life Interest only—Tax paid during Period of Accumulation—Right to Repayment of Tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 25.

In pursuance of the provisions of a settlement the income of the prospective share of a beneficiary was accumulated during her minority and added to the capital thereof, and the beneficiary on coming of age acquired a life interest in that share. During the period of accumulation income tax had been paid each year in respect of the income of the share :—

Held, that the income had been accumulated "for the benefit" of the beneficiary within the meaning of the Income Tax Act, 1918, s. 25, notwithstanding that it had been added to the capital of a fund in which she only acquired a life interest, and, the case being in other respects within the section, that she was, therefore, entitled thereunder to repayment of the amount of the tax so paid.

Decision of Rowlatt J. [1927] 2 K. B. 491 affirmed.

APPEAL from a decision of Rowlatt J. (1) on a case stated by Commissioners for the General Purposes of the Income Tax.

The facts as stated in the case were as follows :—

On October 29, 1925, Mary C. L. Mitcalfe (formerly Burn), the wife of W. S. Mitcalfe (hereinafter called "the respondent"), appealed to the Commissioners against an objection made by A. P. Dale, an inspector of taxes (hereinafter called "the appellant"), to a claim made by the respondent for relief under the Income Tax Act, 1918, s. 25 (2),

(1) [1927] 2 K. B. 491.

(2) Income Tax Act, 1918, s. 25 : "Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment of that income and the income from any other fund subject to the like trusts for accumulation and of the total income of that person from all sources (hereinafter referred to as 'the aggregate yearly income') is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax, that person shall, on making a claim for the purpose within three years after the end of the year of assessment in which the contingency happens, be entitled, on proof of the claim in manner prescribed by this Act, to have repaid to him on account of the tax which has been paid in respect of the income during the period of

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in respect of income accumulated under the settlement hereinafter mentioned.

By a settlement dated October 18, 1910, made between John Henry Burn and the trustees therein named, the said J. H. Burn (hereinafter called "the settlor") settled certain stocks, securities and moneys (hereinafter called "the trust funds") upon trusts in favour of his two sons and three daughters, all of whom were then minors. The settlement contained the following clauses, which set forth the said trusts so far as they were relevant to the questions raised in the case :—

Clause 5. ". . . . . Upon trust for all or any the children or child of the settlor . . . . who being male shall attain the age of 21 years or being female shall attain that age or previously marry if more than one in equal shares except that each son shall take double the share of each daughter."

Clause 7. "Provided further that the said trustees or trustee shall retain the share of each daughter of the settlor now living of and in the trust funds upon the trusts following (that is to say) the said trustees or trustee shall pay the income thereof to such daughter during her life and so that during coverture the same shall be for her separate use without power of anticipation but which restraint shall not preclude the payment of such income to a bank or banker for the credit of such daughter and after the death of such daughter shall stand possessed of her said share upon the like trusts and subject to the like powers and provisions in favour of the issue of such daughter as are hereinbefore declared and contained concerning the share of each of the sons of the settlor now living in the trust funds. . . . ."

Clause 9. "Provided always and it is hereby declared that notwithstanding the trusts hereinbefore declared of the shares of the children of the settlor now living it shall be

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accumulation a sum equal to the aggregate amount of relief to which he would have been entitled if his total income from all sources for each of the several years of the said period had been equal to the aggregate yearly income for that year; but in calculating that sum a deduction shall be made in respect of any relief already received."

lawful for each of such children by deed executed in contemplation of his or her marriage or when married by will or codicil to appoint that all or any part of the income of his or her original and accruing share or shares in the trust funds shall from and after his or her death be paid to his or her wife or husband (as the case may be) for her or his life or any less period and upon such conditions and with such restrictions as such child making the appointment shall think fit."

Clause 10. "Provided always that the said trustees or trustee shall apply the whole or such part as they or he in their or his discretion shall think fit of the income of the expectant or presumptive share whether settled or unsettled of any child or grandchild of the settlor in the trust funds under the trusts hereinbefore contained for or towards his or her maintenance education or benefit (whether there is any other fund applicable or any person bound by law to provide for such maintenance or education or not) and may either themselves so apply the same or may pay the same to the parents or guardians or guardian of such child or grandchild for the purpose aforesaid without seeing to the application thereof and shall during the minority of any such child or grandchild and in the case of a female spinsterhood accumulate the surplus (if any) of the same income by investing the same and the resulting income thereof in any of the investments hereby authorised in augmentation and so as to follow the destination of the share from which the same shall have proceeded but with power to apply any such accumulations in any subsequent year for or towards the maintenance education or benefit of the child or grandchild for the time being presumptively entitled as aforesaid in the manner in which such accumulations might have been applied had they been income arising in the then current year."

Clause 11. "Provided always that the said trustees or trustee shall have power to raise any part or parts not exceeding together one half part or share of the capital of the then expectant presumptive or vested share (whether settled or unsettled) of any child of the settlor or of any grandchild

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of the settlor under the trusts aforesaid and apply the same in or towards the purchase of any business or partnership or for the purposes of a settlement in consideration of an intended marriage or otherwise for his or her advancement preferment or benefit as the said trustees or trustee shall in their absolute discretion think fit notwithstanding that the child of the settlor for whose benefit the same shall be so applied shall be a life-tenant only but so that no such moneys shall be raised and applied as aforesaid out of the settled share of any child of the settlor without the consent in writing of such child and of his or her wife or husband if entitled to any interest therein by virtue of any such appointment as aforesaid. . . . ."

The settlement was annexed to and formed part of the case.

The respondent was a daughter of the settlor, and attained the age of twenty-one years on May 26, 1921. The respondent was married to her present husband, William Stanley Mitcalfe, on August 31, 1922. Income tax at the rates appropriate to each tax year had been duly paid by deduction or otherwise by the trustees of the settlement in respect of the whole income of the trust funds up to the said May 26, 1921. As from the said May 26, 1921, the income of her share of the trust funds, including the income of her share of the invested accumulations, had been paid to the respondent, and she had been fully repaid all the tax recoverable by her in respect of such income up to the date of her marriage.

A claim under the said section for repayment of the sum of 380*l.* 3*s.* 11*d.* for or on account of tax paid or deducted in respect of income accumulated during her minority under the settlement was made by the respondent on September 12, 1922, to the appellant, and was refused by him. The accumulations of income from the trust funds were, during the minority of the respondent, set aside to the credit of a separate accumulations fund in the names of the trustees of the settlement.

The claim was refused by the appellant on the ground "that as the accumulations of the income are added to the

capital of the trust fund which never passes to the beneficiary the claim under s. 25 . . . . cannot be admitted."

It was contended on behalf of the respondent that the surplus income of the trust fund had been accumulated during her minority for her benefit to the extent of the share thereof to the income of which she became entitled on May 26, 1921, inasmuch as on attaining the age of twenty-one years she became entitled to receive the income from these accumulations in addition to her other income; that the words "for the benefit of" in s. 25 must be given their ordinary meaning, there being nothing in the Act to restrict that meaning in the way suggested by the Crown; that the surplus income had been accumulating for the benefit of the respondent within the meaning of s. 25 none the less because she was not under the trusts of the settlement entitled absolutely to those accumulations; and that clause 10 of the settlement empowered the trustees to apply accumulations in any subsequent year for the benefit of the child or grandchild presumptively entitled to a share in the trust funds in the manner in which such accumulations might have been applied had they been income arising in the then current year.

The appellant contended (inter alia) that the respondent was not entitled to the repayment claimed under s. 25, and that the claim had been rightly refused.

The Commissioners held that the respondent was entitled to repayment of the tax, the subject of the claim.

The sole question for the Court was whether the respondent was entitled to the relief allowed by s. 25.

Rowlatt J. held that the income had been accumulated "for the benefit" of the respondent within the meaning of s. 25, notwithstanding that it had been added to the capital of the fund in which she only acquired a life interest, and, the case being in other respects within the section, that she was, therefore, entitled thereunder to repayment of the amount of the tax so paid.

The Crown appealed. The appeal was heard on October 27 and 28, 1927.

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Sir Douglas Hogg A.-G. and *R. P. Hills* for the appellant. *Latter K.C.* and *Cyril King* for the respondent were not called upon.

LORD HANWORTH M.R. This is an appeal from a decision of Rowlatt J., and we have, upon the facts of this case, to interpret the meaning of what is now s. 25 of the Income Tax Act, 1918, a section which reproduces in exactly similar terms s. 14, sub-s. 1, of the Finance Act, 1917.

The facts of the case are as follows: By a settlement of October 18, 1910, John Henry Burn, the father, made a settlement in favour of his children. He had, at that time, two sons and three daughters, all of whom were minors, and he gave his estate into the hands of his trustees to be held on trust for all his children who were then living, who being male should attain the age of twenty-one years or being female should attain that age or previously marry, in equal shares, except that each son was to take double the shares of each daughter. The shares of the sons were to be settled upon their attaining the age of twenty-one upon trusts under which they took protected life interests. The shares of the daughters were to be retained and the income only thereof was to be paid to them during their lives and so that during coverture the same should be for their separate use without power of anticipation.

With regard to this particular claim it is a claim by one of those daughters, Mary Catherine Louise Burn, who attained her majority on May 26, 1921. A year afterwards, on August 31, 1922, she married her present husband, Mr. William Stanley Mitcalfe. During the minorities of the children, whilst the trust was in force, the accumulations of income from the trust fund were set aside to the credit of a separate accumulations fund in the names of the trustees of the settlement, and during that time apparently payments were made in respect of tax or tax was deducted in respect of the income of the accumulations fund, and particularly during the minority of Mrs. William Mitcalfe. With regard to the particular fund to which Mrs. Mitcalfe was entitled as between

the date of her majority and up to her marriage, the case tells us that she has been fully repaid all the tax recoverable by her in respect of the income between her majority and her marriage, but she now claims that a sum of 380*l.* 3*s.* 11*d.*, which was deducted in respect of income which was accumulated for her during her minority, should be repaid to her on the ground that the total income to which she was entitled during those years in which tax was paid was not of such an amount as caused the liability to income tax to attach; in plain words, that during the number of years in which the income of her share was accumulated for her, tax was paid to which the fund was not liable, and that the total amount of the tax so paid had reached, at her majority, the sum of 380*l.* 3*s.* 11*d.* She has now made a claim to have that sum repaid to her, and she relies upon the terms of s. 25 of the Income Tax Act, 1918, which provides that: "Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment of that income and the income from any other fund . . . . is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax," that person may claim to have repaid to him the tax which has been paid in respect of the income during the period of accumulation.

It is said on behalf of Mrs. Mitcalfe that during those years in which the income was accumulated for her benefit, the accumulations were depleted by the fact that sums were deducted from them in payment of taxes, and that the total amount of those deductions is the sum which I have already mentioned, 380*l.* 3*s.* 11*d.* She claims that the aggregate sum accumulated for her benefit would have been increased and would amount to a larger sum by 380*l.* 3*s.* 11*d.* if sums had not been deducted for taxation to which she was not liable.

Now the question that we have to decide is whether or not this s. 25 gives her the relief which she seeks. It is said on the part of the Attorney-General that she is not entitled to

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the relief because, under the terms of the trust made by the settlor, she never became absolutely entitled to those accumulations of income when she attained her majority. Those accumulations were to be held by the trustees and added to the corpus of the fund, and thereafter the trustees were to pay the income thereof to the daughter during her life. The fund, therefore, in respect of which she was entitled to the income would have been larger by this 380*l.* 3*s.* 11*d.*, but under the terms of the settlement at no time was she entitled to receive out and out the accumulations which had been piled up during her minority.

There are no cases which afford us any guidance in the matter, and we have therefore to look at the actual terms of the section. It appears plain, if the effect of the section is what the Attorney-General claims it to be, that in the usual form of settlement there would be a differentiation between the sons and daughters, though that would not be so in the present case having regard to the actual terms of the settlement both of the sons' funds as well as the daughters' funds. But I have come to the conclusion that Rowlatt J.'s judgment is right. He calls marked attention to the fact that the words used in this section are not "accumulated for any person" but "accumulated for the benefit of any person" contingently on his attaining some specified age or marrying. It would seem plain that in ordinary parlance it would be said that these accumulations which were being held for the ultimate advantage of the daughters were accumulations that were being made for the benefit of those daughters. It is true that they would not receive the corpus of the accumulations, but only the income; but they would be benefited to the extent of the increased income arising from the addition to corpus of those accumulations without any deduction of income tax. In other words, it appears that this fund has been accumulated "for the benefit" of a daughter, even if the corpus of the accumulations is not to be handed over to her, but only the income arising from it. The sum that was being accumulated during the years of the minority was being depleted by the

payment of income tax which ought not to have been deducted. If the taxes be repaid when the accumulations are ultimately handed over to the person for whom they were accumulated, the benefit secured by that person is enhanced, if only as to income and not as to corpus. It appears to me, too, that, under the words of the section, the right that is given is a personal right to the person to make this claim within a time limit. That time limit is estimated by reference not to the actual contingency itself, but to the year in which the contingency happens. The nature of the interest of the person claiming under the terms of the trust is a result of the operation of the trust, and does not arise out of any direct relation between the person claiming and the Crown. It arises from a disposition operating between the person claiming and her trustees under which her right is different from the ordinary right which she would enjoy if the money was to be paid to her direct.

The section, to my mind, is intended to put right the inequity which arose from taxes being deducted from an income which that income was not liable to pay. It is a section designed to secure the repayment of sums which ought not to have been taken from the income. The person who is entitled to put that section in force is the person who satisfies the terms of it. Contingently on her attaining a specified age or marrying, she becomes entitled to put her rights in force in respect of moneys which have, during the period of her minority, been accumulated in the broader sense "for her benefit" and she is not disentitled to do that even if, under the terms of the settlement, she must suffer those accumulations which have been made to be placed in settlement for her, and is only entitled to receive the income thereof but not these accumulations themselves, outright.

For these reasons it appears to me that Rowlatt J. rightly interpreted the section, that the claim of the Crown fails, and that the appeal must be dismissed with costs.

SARGANT L.J. I am of the same opinion. Before dealing with the effect of the section here I should like to say that

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the statement of the settlement in the case as it stands is not, in my opinion, sufficiently full. I desire therefore to add to it a statement of certain clauses in the settlement which do not appear in the case itself, though the settlement itself is annexed to and forms part of it.

In the first place, by clause 6 there is a settlement of the share of each son giving him a protected life interest, and then proceeding to give the capital of the fund to his issue as he shall appoint, and in default of and subject to appointment, amongst all his children who as to sons attain twenty-one or as to daughters attain twenty-one or marry. It is to that provision that clause 7 of the settlement refers. In clause 7 what is given to the daughter is a life interest restrained from anticipation during any coverture, and then the fund is given to her issue upon trusts corresponding with those in favour of issue in the case of a son's share.

Then clause 9 ought to have been set out, I think, or at any rate is material, because that clause gives a beneficial power to the son or the daughter, as the case may be, to appoint a life interest to a surviving husband or wife, and I may remark that it has been held that a power of jointuring is a power for the person's own benefit, and he may dispose of it or deal with it for a valuable consideration to come to him.

Then clause 11 of the settlement provides that the trustees may raise any part of the capital of any presumptive or vested share, and may apply it towards the purchase of any business, or for the purpose of a settlement on an intended marriage of the daughter; again a clause very markedly for the benefit of the child, son or daughter, as the case may be.

Then there is an accruer clause as between the shares, and the ultimate gift to charities is only in the event of there being no son or daughter of any son or daughter of the settlor.

Now in that state of things we have to consider whether this income that has been accumulated was income accumulated for the benefit of the daughter within the meaning of the section. The law at the time of the passing of the subsection of the Finance Act, 1917, which was afterwards

adopted in s. 25 of the Income Tax Act, 1918, was this, that in the case of a vested interest of an infant whose income from the trust fund was less than the prescribed amount the trustees for the infant were entitled to get back the income tax deducted at the source from the income of the infant, because it was the absolute property of the infant, and the trustees were merely acting on behalf of the infant in getting back that income tax just in the same way in which the infant would have acted for himself or herself had he or she been of full age. But with regard to the income of a share which was contingent upon the child attaining twenty-one, there was no power to get back any income tax which had been deducted while the income was being accumulated for the benefit of the child should the child ultimately attain twenty-one. Yet on principle (I mean looking at it broadly apart from the law) there was no reason why a child whose share was contingent on attaining twenty-one and who had attained twenty-one, should not, if his income in the meantime had been under the prescribed amount, have had the same right to recover deducted income tax as if the gift had been vested. Still that was the position of affairs at that time, and the section was undoubtedly passed for the purpose of putting a child whose share was contingent and had subsequently vested upon the same footing as a child whose share was vested from the first.

But that does not dispose of the matter, because it might very well be that what the legislature was aiming at was only to remedy that anomaly in a case where the child on attaining twenty-one would become absolutely entitled. It is, however, to be observed that if that were the sole effect of the Act, the Act while curing one anomaly would certainly have created another anomaly, because in an ordinary form of settlement—and I think the Act is having regard to ordinary forms of settlement when it speaks of income accumulated for a person contingently on attaining some specified age or marrying—while a son on attaining twenty-one became entitled to his share absolutely a daughter on attaining twenty-one found that her share was settled on trust for

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herself for life with remainder to her issue, and so on, very much in the way in which the shares of both sons and daughters are settled under the particular settlement in this case. In such a case, regarding the matter from the point of view of general equity or equality as between a son and a daughter, it would seem extremely hard that when income tax had been deducted from the small income of the son he should when he attained twenty-one be entitled to get that deduction back, but, on the other hand, when the daughter attained twenty-one she should not be entitled to get the like deduction back because she was not absolutely entitled to the fund. I say that would seem to be an inequity, an unfairness as between son and daughter, and in view of that consideration we have to interpret the meaning of the particular language of the section, which is this: "Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying. . . . ." Now the phrase "for the benefit of" is not, I think, a phrase of art at all but a general phrase which has to be interpreted in view of the general nature of the subject-matter which is being dealt with by the section. And in my judgment, where a share of a daughter is settled upon the ordinary trusts which I have described, that share may be and is properly described as settled "for the benefit of" the daughter. It is conceded in this case that under the dispositions of this settlement the accumulations of a share are directed to go in precisely the same manner as the capital of the share, and, therefore, if, in ordinary language, the share of the daughter in the capital of the trust fund is a share settled for her "benefit" it would follow that the accumulations which are to be made during the minority of the daughter and which follow the same destination as the capital of her share, must also be accumulations made for her benefit.

In my judgment, therefore, the words "for her benefit" are amply sufficient to cover, and do include, a case where the daughter does not take absolutely as a son in the ordinary

form of settlement would probably take, but include a case where instead of her taking absolutely there is a superadded settlement effected with regard to her share for the purpose of her protection and the protection of her family and issue. I think that to put a narrower construction on the words would defeat the primary object of the section, and would create, as I have said, a fresh anomaly as between sons and daughters under an ordinary form of settlement.

Of course there is in this case this to be considered, that the result may be, and I think probably is, that the income tax which is recovered will be paid to the daughter herself, and will not be caught by the settlement. She will probably take that absolutely. It is possible—I do not want to decide the point, which may be one to be decided hereafter in the Chancery Division—that the sum so paid to her is itself caught by the settlement and goes with accumulations which have been so much less by reason of the deductions. But assuming that it is not so, and that the daughter gets this sum of 380*l.* or so absolutely, I do not see that there is any difficulty or inconsistency in this. At any rate it is so minor an inconsistency or anomaly as ought not to prevent the Court putting the construction on the words which I have indicated. I agree therefore that the appeal should be dismissed.

LAWRENCE L.J. In my judgment the Commissioners and the learned judge have come to a right conclusion in this case.

The contention on behalf of the appellant is that the exemption given by s. 25 of the Act of 1918 applies only to accumulations of income which become the absolute property of the person for whose benefit they are made. The broad principle upon which the Attorney-General and Mr. Hills relied was that exemption is only allowed in cases where the income in respect of which exemption is claimed belongs to the person claiming the exemption, and it is contended that in such a case as the present, where the accumulations are added to the fund and settled, the tenant for life of the settled fund is not the person to whom the income belongs within

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the meaning of that principle. It is said that the words of the section which, on their face, are wide enough to cover the accumulations in question ought to be construed in a narrower sense as being confined to accumulations which become the absolute property of the person claiming the exemption.

Now it seems to me that the fallacy underlying that argument is the assumption that the accumulations do not belong to the respondent within the true meaning of the broad principle relied upon. In my opinion, where the accumulation of the income of any fund is directed for the benefit of a person who will become entitled to the income of the fund and of the accumulations for life, the income directed to be accumulated belongs to that person within the true meaning of the principle relied upon, and for the purpose of claiming repayment of income tax, that person has sufficient interest in the accumulated income to put him or her on the same footing as a person who becomes absolutely entitled to the accumulations. As has been pointed out by my Lords, if the contrary were the right view, it would lead to this curious anomaly, that in the ordinary case of sons taking absolutely and daughters' shares being settled, the sons would get relief whereas the daughters would not, simply because the daughters' shares in the estate had been settled for their own benefit and protection. In my judgment, neither the language of the section itself nor the principle relied upon justifies the Court in giving any other but the natural meaning to the crucial words "for the benefit of."

For these reasons I agree that this appeal ought to be dismissed.

Appeal dismissed.

Solicitor for appellant: *The Solicitor of Inland Revenue.*

Solicitors for respondent: *Gregory, Rowcliffe & Co., for Cooper & Jackson, Newcastle-upon-Tyne.*

W. I. C.

FARR, SMITH AND COMPANY, LIMITED *v.* MESSERS, LIMITED.

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Nov. 3, 4.

[1925. F. 301.]

Sale of Goods—Note or Memorandum in Writing—Pleading signed by Counsel—Memorandum after Action—Reconstitution of Action—Substitution of new Plaintiffs for original Plaintiffs—Fresh Cause of Action—Institution of Proceedings—Earnest to bind the Contract—Part Payment—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 4.

Sale of Goods Act, 1893, s. 4, sub-s. 1: "A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall . . . . give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

The defendants on January 9, 1924, agreed to sell a quantity of wood to a partnership firm. This firm had previously bought another parcel of wood from the defendants and owed money to them in respect thereof. The firm, being in financial difficulties, formed a limited company for the purpose of raising further capital and duly notified the defendants. On July 9, 1924, after a discussion between the defendants and the directors of the new company with regard to the indebtedness of the old firm to the defendants, it was orally agreed that the new company should give the defendants a cheque and three bills in respect of the indebtedness of the old firm and that the defendants should supply to the new company the goods sold under the contract of January 9, 1924, and accept the new company as buyers of the goods. The new company, subsequently on July 14, 1924, gave to the defendants the cheque and three bills, but the defendants did not deliver the goods under the contract of January 9, 1924, to the new company. The two partners in the old firm then brought an action against the defendants for breach of the contract of January 9, 1924. To that action the defendants put in a defence signed by counsel in which they pleaded, in para. 3, that it had been agreed by the contract of July 9, 1924, that the new company should give the defendants on the following Monday a cheque and three drafts and that the defendants would supply to the new company instead of to the old firm the goods sold under the contract of January 9, 1924, and accept that company as buyers of the goods. The pleadings were then amended and the action was reconstituted, the partners in the old firm being struck out and the new company substituted as plaintiffs, and the cause of action was stated to be a breach of the agreement of July 9, 1924. The defendants then amended their defence and relied upon s. 4 of the Sale of Goods Act, 1893, as a defence to that amended action:—

Held, (1.) that para. 3 of the original unamended defence which was signed by counsel constituted a sufficient note or memorandum in writing of the contract signed by an agent of the party to be charged

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to satisfy s. 4 of the Sale of Goods Act, 1893, inasmuch as the new departure with regard to the parties and the cause of action when the action was reconstituted must be treated as the commencement of the action within the meaning of the rule in *Lucas* v. *Dixon* (1889) 22 Q. B. D. 357;

(2.) that the promise on July 9, 1924, to give the cheque and to accept and deliver the three drafts did not, although followed subsequently by the delivery of the cheque and drafts, constitute an earnest to bind the contract, as the cheque and drafts were not handed over at the time the contract was made but subsequently in part performance of the contract; but

(3.) that the payment of the cheque and the three drafts was something given in part payment for the goods within s. 4 of the Sale of Goods Act, 1893.

ACTION tried before Wright J. without a jury.

On January 9, 1924, the defendants, who were timber importers, entered into a contract by which they agreed to sell to a partnership firm called Farr, Smith & Co., who were boxmakers, 150 to 200 cubic fathoms of first quality firewood, to be used for boxmaking, according to specification at prices which ranged from 9*l.* 10*s.* to 8*l.* 10*s.* per cubic fathom. Payment was to be made by approved acceptances four months from date of discharge of each parcel.

Farr, Smith & Co. had previously purchased from the defendants and received delivery of another parcel of wood goods. In the early part of 1924 the partnership firm were in some financial difficulty, and from time to time they made payments on account to the defendants, and they informed the defendants of their financial position. The firm desired to obtain fresh capital and for that purpose the limited company of Farr, Smith & Co., Ld., the present plaintiffs, was formed, and the defendants were notified.

On or about Wednesday, July 9, 1924, Mr. Farr, who was a partner in the old firm and also a director in Farr, Smith & Co., Ld., together with another director of that company, had an interview with Mr. Goff, a director of the defendant company, and discussed the indebtedness of the old firm to the defendants. Eventually it was agreed that Farr, Smith & Co., Ld., should pay by cash and bills the money due to the defendants from the firm of Farr, Smith & Co., and that Farr, Smith & Co., Ld., should have the benefit of the contract

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for firewood of January 9, 1924. The defendants undertook to perform the contract of January 9, 1924, with Farr, Smith & Co., Ld., instead of with the firm, and to accept the company as buyers of the goods in consideration of receiving from the company a cheque for 200*l.* and three acceptances for 224*l.* 13*s.* 1*d.* in one month, for 225*l.* 19*s.* in two months, and for 227*l.* 5*s.* in three months in respect of the firm's indebtedness to the defendants, in addition to the price of the goods. The defendants received from Farr, Smith & Co., Ld., a cheque for 200*l.* on Monday, July 14, 1924, and also the three acceptances for 224*l.* 13*s.* 1*d.*, 225*l.* 19*s.* and 227*l.* 5*s.*, but the defendants did not deliver the goods under the contract of January 9, 1924, to Farr, Smith & Co., Ld. Requests for delivery were made from time to time and on December 15, 1924, the defendants finally said that they had no contract with Farr, Smith & Co., Ld., for the sale of firewood. The defendants, however, offered to deliver a certain quantity of firewood as under a new contract on certain terms to Farr, Smith & Co., Ld., which offer the company refused.

Farr and Smith in their individual capacity then brought an action against the defendants to recover damages for breach of the contract of January 9, 1924. To that action the defendants on May 12, 1925, delivered a defence signed by counsel, in which they pleaded in para. 3 as follows: "On or about 9th July, 1924, the plaintiff Farr, partner in Farr, Smith & Co., called upon the defendants and said that he and his firm were unable to meet the sums then due to the defendants by the plaintiffs, that to provide money they had formed a limited company, Farr, Smith & Co., Ld., and he then orally requested that the defendants, instead of supplying the plaintiffs with the goods under the agreement of 9th January, 1924, would enter into the following agreement: (1.) That the defendants would accept 200*l.*, to be paid in cash on the following Monday, and the balance by drafts on the said Farr, Smith & Co., Ld., as to 224*l.* 13*s.* 1*d.* in one month, as to 225*l.* 19*s.* in two months, and as to 227*l.* 5*s.* in three months; and (2.) that the defendants would

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supply to the new company which had been formed, called Farr, Smith & Co., Ld., instead of to the plaintiffs the goods sold under the contract of the 9th January, 1924, and accept that company as buyers of the said goods, and the defendants through their Mr. Goff agreed to this arrangement."

Thereupon the pleadings were amended and the action was reconstituted. The plaintiffs, Farr and Smith, were struck out, and the company, Farr, Smith & Co., Ld., were substituted as plaintiffs, and the cause of action was stated to be a claim by the company for damages for breach of the agreement of July 9, 1924, whereby it was agreed that the defendants would supply the company with the goods sold to Farr, Smith & Co., under the contract of January 9, 1924.

The defendants, however, by their defence, delivered on December 15, 1925, pleaded that they had no contract with the company for the sale of firewood, and further relied upon s. 4 of the Sale of Goods Act, 1893, as a defence to the action.

At the trial the defendants called no evidence to contradict the evidence given by the plaintiffs with reference to the verbal agreement of July 9, 1924, and Wright J. found as a fact that there was such an agreement by which the defendants undertook to perform the contract of January 9, 1924, with the plaintiffs instead of with the partnership firm, and that in consideration of that undertaking the defendants were promised and in fact received from the plaintiffs the cheque for 200*l.* and the three acceptances. Wright J. further found that there had been a breach of that contract and that, subject to the defence raised by the defendants under the Statute of Frauds, the plaintiffs would be entitled to damages.

In the course of the trial Mr. Schiller applied for, and obtained, leave to amend the statement of claim by alleging in the alternative as the contract relied upon by the plaintiffs a contract setting out the terms contained in para. 3 of the original defence.

Schiller K.C. and *T. Simpson Pedler* for the plaintiffs. The plaintiffs are entitled to recover damages for the defendants'

breach of contract to sell the goods since the requirements of s. 4, sub-s. 1, of the Sale of Goods Act, 1893, have been fulfilled. In the first place there is a "note or memorandum" in writing of the contract sued on—namely, of July 9, 1924. A pleading in an action which contains all the terms of a bargain and which is signed by the counsel of the party sought to be charged thereunder may constitute a note or memorandum in writing of the contract made and signed by the agent in that behalf of the party to be charged within s. 4, sub-s. 1: *Grindell* v. *Bass*. (1) Para. 3 of the original defence in the present case is, therefore, a sufficient note or memorandum of the verbal contract sued on. The rule in *Lucas* v. *Dixon* (2) that a note or memorandum must have been in existence at the date when the action in which it is sought to give it in evidence was begun does not prevent the plaintiffs relying upon para. 3 of the original defence as a sufficient note or memorandum of the contract in the present case. In *Grindell* v. *Bass* (1) the defence which was held to contain the note or memorandum had been delivered after the writ in the action had been issued but before the addition of the new defendant, who sought to rely upon the original defence as containing a note or memorandum of his contract. In the present case para. 3 of the original defence was delivered before the action was reconstituted and the pleadings amended when the present plaintiffs were substituted for the original plaintiffs, and the cause of action was based upon a different contract to that pleaded originally. For the purposes of the rule in *Lucas* v. *Dixon* (2) the present action must be treated as having commenced when the action was reconstituted, the present plaintiffs being added in substitution for the original plaintiffs and the pleadings amended.

Secondly, the plaintiffs gave the cheque for 200*l*. and the three acceptances in respect of the partnership debt "in earnest to bind the contract." The defendants had no legal right to recover the debt of the partnership firm from the plaintiff company. "Earnest is a gift or token . . . . given by the buyer to the seller to mark the final conclusive assent

(1) [1920] 2 Ch. 487. (2) 22 Q. B. D. 357.

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of both parties to the bargain": see Smith & Watts' Mercantile Law, 12th ed., p. 689. That is precisely what happened here. The fact that the cheque and the bills may be regarded as having been given in part payment does not prevent them from also constituting earnest: *Howe* v. *Smith* (1), per Fry L.J.; *Sumner and Leivesley* v. *John Brown & Co.* (2), per Hamilton J.; and Benjamin on Sale, 6th ed., p. 255; see also *Blenkinsop* v. *Clayton.* (3) An essential characteristic of earnest is that the giver of it would not give it except in return for a contract, and in the present case neither the cheque nor the bills would have been given by the plaintiffs except to secure the contract.

C. M. Pitman K.C. and *Harold Stranger* for the defendants. The requirements of s. 4, sub-s. 1, of the Sale of Goods Act, 1893, have not been complied with. Even if para. 3 of the original defence were a note or memorandum of the contract sued on, still inasmuch as it did not come into existence before the commencement of the action it is not available to the plaintiffs as evidence of the contract: *Lucas* v. *Dixon.* (4) Except in the case of the joinder of a new defendant the beginning of the action must be taken to be the date of the issue of the writ. Where, as in the present case, a new plaintiff is substituted for the original plaintiff, he merely steps into the shoes of the original plaintiff and has to take all his risks. That question did not arise in *Grindell* v. *Bass.* (5) But in any case, when counsel signed the original defence in the present action, he was not the agent of the defendants to make and sign a note or memorandum of the contract within s. 4, sub-s. 1, of the Sale of Goods Act, 1893: see *Thirkell* v. *Cambi* (6), where Bankes L.J. and Eve J. held that a solicitor instructed to deny a contract with which his client is charged is not the client's agent to make or sign a note or memorandum in writing of the contract for the purposes of the statute. In that case it was suggested that the solicitor's letter was a note or memorandum. That case was not

(1) (1884) 27 Ch. D. 89, 102.
(2) (1909) 25 Times L. R. 745.
(3) (1817) 7 Taunt. 597.
(4) 22 Q. B. D. 357.
(5) [1920] 2 Ch. 487.
(6) [1919] 2 K. B. 590.

cited in *Grindell* v. *Bass*. (1) The defence must be looked at as a whole. It is clear from para. 5 that it was not intended by para. 3 to admit a contract with the plaintiffs.

On the second point, the true construction of what passed between the parties was that the giving of the cheques and bills by the plaintiffs to the defendants was part of the consideration for the contract. It could not, therefore, be earnest to bind the contract, or part payment under it, because both those things must be independent of the contract: Benjamin on Sale, 6th ed., p. 256; *Walker* v. *Nussey*. (2)

Schiller K.C. in reply. Earnest is something outside of, but collateral to, the contract which it is to bind. Here the collateral promise to give the cheque and bills was earnest to bind the contract.

[WRIGHT J. A collateral promise cannot amount to earnest. Earnest must be complete at the time the bargain is made.]

If a party to a contract takes the earnest at a subsequent date in consequence of an antecedent promise he is bound by the contract. The defendants agreed to sell the wood to the company at the price at which they had agreed to sell the wood to the firm plus the amount which the firm owed to the defendants, as was pleaded in para. 3 of the original defence. The giving of the cheque and bills would therefore amount to part payment.

WRIGHT J. This is a claim by a limited company, Farr, Smith & Co., Ld., against the defendants, Messers, Ld., for damages for breach of a contract for the sale of certain wood goods. [His Lordship then stated the facts substantially as set out above and continued:] It is said by Mr. Stranger that in pleading para. 3 of the original defence delivered on May 12, 1925, he did not intend to allege an agreement between Farr, Smith & Co., Ld., and the defendants, and that he had not so alleged. In my opinion he has alleged such an agreement whether he intended to do so or not. The position at that stage of the action was that the partnership firm of

(1) [1920] 2 Ch. 487. (2) (1847) 16 M. & W. 302.

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Farr, Smith & Co., that is to say Farr and Smith as partners, were claiming for the firm the performance of the contract of January 9, 1924, and the whole purpose of para. 3 was to allege, in order to defeat that claim, that there had been a novation of the contract. I think that is the reasonable and proper interpretation of para. 3. My attention has been called by Mr. Pitman to a further paragraph of the same defence—namely, para. 5—which provides as follows: "Further or alternatively it was an implied term of the said agreement of the 9th July, 1924, that Farr, Smith & Co., Ld., would enter into an agreement and/or sign a contract forthwith in the terms of the contract of 9th January, 1924, except that the company's name should be inserted instead of Farr, Smith & Co., and that the plaintiffs would arrange that such contract would be entered into by Farr, Smith & Co., Ld., and in breach of the said implied terms Farr, Smith & Co., Ld., failed to enter into the contract." I see no ground whatever to imply any such term, and in fact no evidence has been given of any agreement to that effect, and having regard to the first three words of para. 5: "Further or alternatively," I treat para. 5 as an alternative, and that leaves para. 3 standing in the form in which it appears.

That defence was delivered on May 12, 1925, and thereupon the action was reconstituted and the pleadings were amended. The plaintiffs Farr and Smith as individuals were struck out and the company, Farr, Smith & Co., Ld., were substituted as plaintiffs. The contract which then became the cause of action in these proceedings was the contract of July 9, 1924, between the defendants and Farr, Smith & Co., Ld., and so the action has proceeded down to the present time.

The defendants have relied, as a defence to that action, upon s. 4 of the Sale of Goods Act, 1893, which provides that "a contract for the sale of any goods of the value of 10*l.* or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same"—there is no question of that here—"or give something in earnest to bind the contract, or in part

payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

Mr. Schiller for the plaintiffs contends that the statute has been complied with. He says that there is a note or memorandum in writing of the contract; that an earnest has been given to bind the contract, and that there has been part payment. I must deal with each of these somewhat technical matters in turn.

I shall first consider whether there is a note or memorandum in writing of the contract. Mr. Schiller contended that I could find such a note or memorandum in the letters. I, however, do not think that I can find any such note or memorandum in the correspondence. I find in the correspondence a recognition of a bargain between the parties, but no document or inter-connected documents which sufficiently identify the contract, or specify its terms so as to constitute a note or memorandum as required by the statute. Mr. Schiller then contended that in para. 3 of the original unamended defence there is a note or memorandum in writing of the contract. Subject to a further point I think that para. 3 of the original unamended defence does contain a complete note or memorandum of the bargain which was entered into verbally on July 9, 1924. It has, however, been held in *Lucas* v. *Dixon* (1) that a note or memorandum of the contract, in order to be successfully relied upon, must have been in existence at the time that the action was brought, and it is not enough that it should be in existence at the time when it is sought to prove the case by producing the note or memorandum in writing. That was a decision of a strong Court following no doubt on the earlier form of the statutory provision, but it is a decision which has been accepted in subsequent cases and must be treated as binding on this Court. Fry L.J., who was one of the members of the Court of Appeal, said (2): "I will only add this observation, that the conclusion at which we have arrived is a somewhat singular one. The statute requires the memorandum as evidence, but

(1) 22 Q. B. D. 357. (2) 22 Q. B. D. 363.

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requires that evidence to be in existence at the commencement of the action which is brought to enforce the contract. If, then, it only comes into existence after the commencement of such an action, and the plaintiff desires to avail himself of it, he can only do so by discontinuing the action and commencing another." The same great judge in his work on Specific Performance at sect. 497, after referring to the decision in *Leroux* v. *Brown* (1) to the effect that the statute relates merely to procedure, further adds that that decision "is difficult to reconcile with the well-settled rule which requires that the writing relied on as taking a case out of the statute should be in existence before action brought; a requirement which would be unreasonable and contrary to the usual practice, if it related only to procedure and did not go to the solemnities of the contract." That rule is now well settled. In this case, however, the plaintiffs have thought fit, instead of discontinuing the action which was originally brought in the name of the firm, to take a course which is now permissible or at least is not objected to under the modern procedure, that is to say, they have struck out the names of the original plaintiffs and have substituted the names of the limited company as plaintiffs, and they have altered the cause of action, because, whereas the original action was an action based on a breach of the contract of January 9, 1924, between the firm and the defendants, the present proceedings are based on a breach of a different contract—namely, the verbal contract of July 9, 1924, between the plaintiff company and the defendants. In these circumstances I have to determine in what sense the rule laid down in *Lucas* v. *Dixon* (2) is to be applied to the present case. I think that I am justified in holding that the rule in *Lucas* v. *Dixon* (2) is satisfied on the facts of this case. I think that the memorandum relied upon—namely para. 3 of the original unamended defence—ought to be held to have been in existence at the commencement of the action which was brought to enforce the contract of July 9, 1924. I come to this conclusion because until the proceedings were reconstituted there was on foot no

(1) (1852) 12 C. B. 801. (2) 22 Q. B. D. 357.

action to enforce the contract now in suit. I think that it ought to be held, so far as the rule which I am considering is concerned, that where there is an entirely new departure in the way of the parties and the cause of action, even although by reason of the modern procedure use is made of the existing writ, that new departure is for the purposes of this rule to be treated as the commencement of the action which is the subject of the particular inquiry. On that basis I hold that on the facts of this case this memorandum is sufficient to satisfy the requirements of s. 4 of the Sale of Goods Act, 1893.

I ought to refer to a decision of Russell J. in *Grindell* v. *Bass* (1), where a memorandum did come into existence in the course of the action, but before the party who sought to rely upon it had become a party to the action. In that case there was an action for specific performance of a contract to sell a house. There was a defence, signed by counsel, alleging that the defendant in the action for specific performance had already contracted to sell the property to a third party, who was thereupon added as a defendant by the plaintiff. This new defendant counterclaimed for a declaration based upon the contract alleged in the defence signed by counsel at an earlier stage in the action, and it was held by Russell J. that that party was entitled to rely upon the paragraph in the defence of the original defendant which contained all the terms of the third party's contract as being a note or memorandum of that contract. I think that that case, although it is not a precise authority for the conclusion at which I have arrived, does lend support to the view which I have expressed as to the true meaning to be attached to the words in the rule in *Lucas* v. *Dixon* (2) "at the commencement of the action which is brought to enforce the contract." I ought in referring to *Grindell* v. *Bass* (1) to add that I rely upon it in support of the conclusion at which I have arrived that a note or memorandum signed by counsel in a defence is a note or memorandum in writing of the contract

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"signed by the person to be charged or his agent in that behalf" within the meaning of s. 4, sub-s. 1, of the Sale of Goods Act, 1893. That being so I hold that the section was satisfied in so far as there was a good note or memorandum in writing of the contract.

I think it is desirable, however, that I should deal with the other two points relied upon by Mr. Schiller. One is that there was an earnest given to bind the contract, and the other is, in the alternative, that there was part payment. Dealing with the former of these points, it is somewhat difficult to give a precise definition of the word "earnest." Certain characteristics, however, seem to be clear. An earnest must be a tangible thing, in which definition it may be that a deposit is included, but in the old cases it was always some tangible thing. That thing must be given at the moment at which the contract is concluded, because it is something given to bind the contract, and, therefore, it must come into existence at the making or conclusion of the contract. The thing given in that way must be given by the contracting party who gives it, as an earnest or token of good faith, and as a guarantee that he will fulfil his contract, and subject to the terms that if, owing to his default, the contract goes off, it will be forfeited. If, on the other hand, the contract is fulfilled, an earnest may still serve a further purpose and operate by way of part payment.

In *Howe* v. *Smith* (1) Fry L.J., dealing with a deposit paid upon a contract for the sale of land, says this with reference to a deposit: "Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates

(1) 27 Ch. D. 89, 101.

by the fear of its forfeiture a motive in the payer to perform the rest of the contract."

In *Sumner and Leivesley* v. *John Brown & Co.* (1) Hamilton J. said this: "'Earnest' . . . . meant something given for the purpose of binding a contract, something to be used to put pressure on the defaulter if he failed to carry out his part. If the contract went through, the thing given in earnest was returned to the giver, or, if money, was deducted from the price. If the contract went off through the giver's fault the thing given in earnest was forfeited."

In Benjamin on Sale, 6th ed., p. 255, there is a definition which is to the same effect. The author says: "The giving of earnest, however common in ancient times, has fallen so much into disuse, that the two expressions in this clause of the Statute of Frauds, identical with that in the Code, 'give something in earnest' or 'in part payment,' are often treated as meaning the same thing, although the language clearly intimates that the earnest is 'something to bind the bargain,' or, 'the contract,' whereas it is manifest that there can be no part payment till after the bargain has been bound, or closed. Earnest may be money, or some gift or token (among the Romans usually a ring), given by the buyer to the seller, and accepted by the latter to mark the final conclusive assent of both sides to the bargain; and this was formerly a prevalent custom in England. And an earnest did not lose its character because the same thing might also avail as a part payment." The learned author refers to what was then the only decided case, not a very clear one, of *Blenkinsop* v. *Clayton* (2), where it was held that there must be an actual transfer of the thing which constituted the earnest. I ought to add that in *Sumner and Leivesley* v. *John Brown & Co.* (1) Hamilton J. refused to treat the delivery of certain bags to be loaded with potatoes which had been furnished under the contract, as being in the nature of earnest. He held that the bags were sent to facilitate the performance of the contract, and not to bind it.

I do not think that, on the facts of this case, as I find them,

(1) 25 Times L. R. 745. (2) 7 Taunt. 597.

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there was anything which can be held to be an earnest within the definition which I have stated. There was nothing given at the time the contract was made to bind the bargain, as I find the facts. There was a promise to give a cheque and a promise to accept and deliver certain drafts, but I think these matters were part of the promise, and, as I shall explain in a moment, in my opinion part of the consideration for the contract. They were not anything given at the time of the conclusion of the contract with the object, or intention, of binding the contract. A few days afterwards the cheque and the drafts were given and the cheque was paid, but I think that was done after the contract was made and in fulfilment and partial performance of the contract.

But there is another contention put forward in the alternative by Mr. Schiller on these facts, and for that purpose he has asked for, and I have given him, leave to add to his statement of claim an alternative allegation of the contract relied upon, setting out all the terms contained in para. 3 of the original defence. I think the contract so stated is the true and complete contract which was entered into on July 9, 1924. Taking that as the complete contract, I hold that the contract was for the sale of goods and that the consideration from the plaintiffs to the defendants was twofold. It was not merely a promise to fulfil the conditions as to payment contained in the original contract, that is to say to pay on certain terms after the goods were delivered and shipped. It was also a promise to pay as part of the consideration for the future delivery of the goods, those amounts which were involved in the cheque for 200*l.* and the three drafts, and I hold that the payment of that cheque and the payment of these drafts was a part payment under the contract for the sale of goods within the meaning of s. 4 of the Sale of Goods Act, 1893.

On these grounds I hold that the technical defences raised to this claim fail, and the only question I have now to consider is the question of damages, which is not free from difficulty and on which the evidence is not at all satisfactory. I intend to arrive at an estimate of damages as if I were a jury,

and taking as I do the contract quantity of 150 standards, I shall award as a fair estimate of what the plaintiffs have lost the sum of 300*l.*

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Judgment for plaintiffs.

Solicitors for plaintiffs: *Woodham Smith & Borradaile.*
Solicitors for defendants: *Trinder, Kekewich & Co.*

R. F. S.

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Ex parte HAYNES-SMITH.

Referred to. NAKKUDA ALI *v.* JAYARATNE [1951] A. C. 66

Ecclesiastical Law—Church Assembly—Legislative Committee of Church Assembly—Prohibition—Certiorari—Church of England Assembly (Powers) Act, 1919 (9 & 10 *Geo.* 5, *c.* 76), *s.* 3.

Neither the Church Assembly nor its Legislative Committee is a body having legal authority to determine the rights of subjects and having the duty to act judicially, and therefore writs of prohibition or certiorari from the Court of King's Bench will not issue to these bodies.

Rex v. *Electricity Commissioners* [1924] 1 K. B. 171 followed.

RULES NISI for prohibition and certiorari.

On the motion of Sir William Haynes-Smith, a member of the Church of England, a rule nisi for prohibition was directed to the Legislative Committee of the National Assembly of the Church of England to prohibit them from proceeding further with the Prayer Book Measure, 1927.

Rules nisi for certiorari were also directed to the Legislative Committee and to the Church Assembly to bring up and quash the Measure and the "deposited book" annexed to it on the grounds: (1.) that the Prayer Book Measure, 1927, was not a measure passed by the Church Assembly within the Church of England Assembly (Powers) Act, 1919, and that it was not passed by the Church Assembly in accordance with the requirements of article 14 (1.) of its constitution,

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in that it was never debated by each House sitting separately.

Sir John Simon K.C. and *Wilfrid Lewis* for the Legislative Committee showed cause. The Court has no jurisdiction to issue these writs in the present case. Neither the Church Assembly nor its Legislative Committee is a Court in the strict sense, nor do they exercise judicial functions. They are deliberative bodies only, and so far as legislation is concerned their functions are limited to initiating proposals under the Church of England Assembly (Powers) Act, 1919. It follows that a writ of prohibition cannot issue to them. The same applies to certiorari with the addition that the body to whom it is directed must have made an order : *Rex* v. *Electricity Commissioners.* (1)

[They were stopped.]

Stuart Bevan K.C. and *F. H. L. Errington* for the Church Assembly.

Sir Malcolm Macnaghten K.C. and *Storry Deans* in support of the rules. This is not a question of procedure but of jurisdiction. Assuming that the Prayer Book Measure, 1927, has not been properly passed by the Church Assembly in accordance with its constitution as laid down by the Act of 1919, any subject who is also a member of the Church of England is entitled to writs of prohibition and certiorari. A voluntary unincorporated body must keep within the powers conferred on it by law, and if it fails to do so any member may come to this Court for redress : *Rex* v. *Electricity Commissioners.* (1) The order which it is here sought to quash was the order of the Church Assembly directing the measure of 1927 to be passed, and the corresponding order of the Legislative Committee.

[They referred also to *Henderson* v. *Bank of Australasia* (2) ; *Bunbury* v. *Fuller* (3) ; *Reg.* v. *Nunneley.* (4)]

The questions raised by the rules upon the merits were argued, but are not here material in view of the judgments of the Court, which were as follows :—

(1) [1924] 1 K. B. 171.
(2) (1890) 45 Ch. D. 330.
(3) (1853) 9 Ex. 111.
(4) (1858) E. B. & E. 852.

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LORD HEWART C.J. These are rules nisi for a writ of prohibition and a writ of certiorari. It is sought that a writ of prohibition may be issued to prohibit the Legislative Committee of the Church Assembly, under the Church of England Assembly (Powers) Act, 1919, from further proceeding with the matter of a certain measure entitled, "Prayer Book Measure, 1927," and with the matter of a certain book referred to in that measure as the "deposited book." It is also sought that a writ of certiorari should issue directed to the Church Assembly itself, and to the Legislative Committee of the Church Assembly, or to one of them, to remove into this Court all and singular the records of a certain measure entitled, "Prayer Book Measure, 1927," and of the "deposited book."

The grounds upon which the rules nisi, both for prohibition and for certiorari, were asked and obtained are the same. They are two: First, that the Prayer Book Measure, 1927, is not a measure passed by the Church Assembly within the meaning of s. 3, sub-s. 1, of the Church of England Assembly (Powers) Act of 1919; and, secondly, that that measure was not passed by the Church Assembly in accordance with the requirements of section or article 14 (1.) of the Constitution, inasmuch as it was never debated by each House sitting separately.

Various questions which are of interest and importance in their proper place have been suggested in the course of the argument before us, but they do not seem really to arise upon the consideration of these rules. We are not concerned with such questions as: (1.) What are the merits or demerits of the Constitution recognized by the Church of England Assembly (Powers) Act, 1919? (2.) Whether the true effect of the statute and the constitution, taken together, is to subtract large powers from Parliament, and to confer upon the Bishops far reaching powers, both of veto and of initiative? (3.) Whether it is a paradox, or a commonplace, to say that the offer of an optional alternative is the same thing as the imposition of a compulsory change? (4.) Whether a measure which leaves the Book of Common Prayer intact is the same

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measure as one which insists upon fundamental changes in it? or (5.) Whether it is true to say that the National Assembly of the Church of England has here accepted a measure which ought never to have been proposed to it, or whether there has been referred to the Legislative Committee a measure which ought never to be passed into law? These questions, and others like them, whatever may be the real degree of their difficulty and importance, are not questions for this Court. They have not been developed in the argument before us for the reason that it did not appear to be necessary to develop them; and, of course, if they were to be examined it would be necessary to ascertain, not only whether the conclusion of the argument flowed from the premises, but also whether the premises themselves were, in fact, well founded.

In my opinion there is here a preliminary question which is of a decisive character, and that question at any rate has been fully argued upon the one side, and upon the other side. That question is whether the Legislative Committee of the Church Assembly, or the Church Assembly itself, is a body of the kind to which in circumstances like these a writ of prohibition or a writ of certiorari ought to issue from this Court.

The circumstances in which those discretionary writs are issued have often been considered. They were restated in concise and clear terms by Atkin L.J. in *Rex* v. *Electricity Commissioners*. (1) Speaking of the matter which was then before the Court Atkin L.J. said: "The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the Court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of

(1) [1924] 1 K. B. 171, 204.

excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." There followed in the judgment of the learned Lord Justice a reference to a series of cases on very different subject-matters in illustration of that cardinal proposition. The question therefore which we have to ask ourselves in this case is whether it is true to say in this matter, either of the Church Assembly as a whole, or of the Legislative Committee of the Church Assembly, that it is a body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially. It is to be observed that in the last sentence which I have quoted from the judgment of Atkin L.J. the word is not "or," but "and." In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially. The duty to act judicially is an ingredient which, if the test is to be satisfied, must be present. As these writs in the earlier days were issued only to bodies which without any harshness of construction could be called, and naturally would be called Courts, so also to-day these writs do not issue except to bodies which act or are under the duty to act in a judicial capacity.

I do not think it is necessary or useful to inquire into the question whether these bodies or either of them can properly be said to have legal authority to determine questions affecting the rights of subjects. That is a question which might well give rise to much controversy. Speaking for myself, I am

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disposed to take the view that their position rather is to set in motion in a preliminary way proposals for legislation which may or may not mature into legislation. But however that may be, I do not think it is necessary to determine that question, because I am satisfied that it is not true to say of either of these bodies that it has the duty to act judicially.

The opening words of the Constitution, recognized and given the force of law by the statute, are these: "There shall be a National Assembly of the Church of England . . . . to deliberate on all matters concerning the Church of England, and to make provision in respect thereof." As part of the appropriate machinery, it is required that the Assembly shall appoint a Legislative Committee, including members of all three Houses, to whom any measure which it is desired to pass into law shall be referred; and it is provided further that the Legislative Committee shall thereupon take such action as may be authorized by statute in order that such measure may become law. In other words, the topic is the machinery, and the internal economy of a deliberative Assembly, the function of which, so far as the present matter is concerned, is to deal with the earlier stages of that which, if the whole programme is carried out to the end, may become a statute. That does not seem to me to be a judicial body. It seems to me to be a deliberative or legislative body, and I do not think that either the Assembly itself or its Legislative Committee is a body of the kind to which it would be appropriate to issue a writ, whether of prohibition or of certiorari.

I refrain deliberately from entering upon any of the many matters which, either by express statement or by suggestion, have been touched on in the course of the long and interesting discussion before us. I found my judgment upon the single proposition that in my opinion it is not true to say of these bodies, or of either of them, that they satisfy the test of having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially. In those circumstances, and for those reasons, I think that both of these rules ought to be discharged.

AVORY J. I agree that these two rules should be discharged on the ground which has been fully explored by my Lord, that neither the writ of prohibition nor the writ of certiorari will lie either to the Legislative Committee or to the National Assembly of the Church of England in the circumstances of this case. There appears to be no reason for distinguishing between the writ of prohibition and the writ of certiorari. The practical difficulty which might ensue if attempts were made to enforce either of those writs might be the same in both cases; the principle upon which we decide this case applies equally to both.

Adopting that principle upon which the Court of Appeal acted in *Rex* v. *Electricity Commissioners* (1), the principle which has been already read from the judgment of Atkin L.J., and to which I will only add a passage in the judgment of Bankes L.J., where he says: "These authorities are, I think, conclusive to show that the Court will issue the writ to a body exercising judicial functions, though that body cannot be described as being in any ordinary sense a Court." I am of opinion that neither of these bodies is a body exercising judicial functions, or determining judicial rights or obligations of subjects of the realm, within the meaning of that or any other previous decision of the Courts.

The appellation "Legislative Committee" appears to be repugnant to the idea that they are exercising judicial functions, or determining rights and obligations, and in my view the intention and effect of the Act of 1919 is to authorize the National Assembly, acting through and by means of its Legislative Committee, to promote legislation, subject to certain safeguards which are therein provided. Turning to the Preamble of the Act itself, that view appears to be plain. The Preamble of the Church of England Assembly (Powers) Act of 1919 is in these words: "Whereas the Convocations of Canterbury and York have recommended in Addresses presented to His Majesty on the 10th day of May, 1919, that, subject to the control and authority of His Majesty and of the two Houses of Parliament, powers in regard to

(1) [1924] 1 K. B. 171, 194.

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legislation touching matters concerning the Church of England shall be conferred on the National Assembly of the Church of England constituted in the manner set forth in identical terms in the Appendix."

It is suggested that what has been done in this case has invaded, or proposes to invade, the right of the members of the Church of England to have the Prayer Book, as settled and authorized in 1662, used in the Church which they attend without alteration or amendment of any kind. Even if this were so, there appears to me to be no ground for saying that such right has been determined judicially by either of these bodies. In this connection I should like to refer to one of the Standing Orders, No. 32, upon which we have heard considerable discussion. Para. (*d*) of Standing Order 32 provides that: "When the House of Bishops has concluded all the stages of the measure, except the stage of final approval, further proceedings on the measure shall be suspended until the Archbishops of Canterbury and York shall have consulted the Convocations of their Provinces in respect to the measure, and obtained the consent of those Convocations to the measure being laid before the whole Assembly for final approval. And if the consent of either Convocation shall be withheld, the Archbishop of the Province concerned shall so inform the Assembly as soon as may be, and thereupon the measure without any question put shall be withdrawn." In other words, unless the measure has been approved by the Convocations of Canterbury and York, it cannot proceed for discussion before the National Assembly; and this curious result would follow. It being admitted—or, rather, it cannot be disputed—that no writ of prohibition or certiorari will lie to the Convocations of Canterbury or York, yet it is suggested that prohibition or certiorari may lie to the Assembly or to the Legislative Committee after the measure has been approved by both those Convocations.

It was suggested that *Reg.* v. *Archbishop of York* (1) was a decision merely on the ground of the antiquity of those bodies, but the real ground of the decision is found in the

(1) (1888) 20 Q. B. D. 740, 748.

concluding words of the judgment of Lord Coleridge C.J.: "Such an interference would not only be without a shadow of precedent but would be inconsistent with the character and constitution of the body with which we are asked to interfere." Those words seem to me just as applicable to the Legislative Committee and to the National Assembly as they were to the Convocation of York in that case, and as they would be to-day to the Convocations of Canterbury or York.

This ground being sufficient to dispose of the matter which is before us, it is unnecessary to express any view upon the other question—namely, whether the decision of the Archbishop of Canterbury can be discussed, or whether this Court can go behind it. It is upon that point sufficient to quote what was said by Lord Coleridge C.J. in *Reg.* v. *Archbishop of York* (1)—namely: "Whether the decision of the Archbishop was correct in point of law is a matter on which we offer no opinion, an expression which must not be taken as suggesting anything in any way unfavourable to it."

For those reasons I agree that the rules should be discharged.

SALTER J. I agree that these rules should be discharged upon the ground which has been stated.

The powers which are conferred by Parliament upon the Church Assembly are powers to initiate legislation. No doubt measures which the Church Assembly prepares and puts forward, if approved by Parliament, and receiving the Royal Assent, will, as statutes, affect the rights of subjects, but it appears to me that Parliament has not conferred upon the Church Assembly any power to determine questions affecting the rights of subjects. The person or body to whom these writs are to go must be a judicial body in this sense, that it has power to determine and to decide; and the power carries with it, of necessity, the duty to act judicially. I think that the Church Assembly has no such power, and therefore no such duty. Its powers are in my opinion purely deliberative and legislative, and there is no judicial element.

(1) 20 Q. B. D. 740, 745.

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The widest statement of the rule, and one very frequently quoted, is to be found in the judgment of this Court delivered by Holt C.J. in *Rex* v. *Inhabitants of Glamorganshire* (1): "This Court will examine the proceedings of all jurisdictions erected by Act of Parliament." It is to be noted that the word used is "jurisdictions." The Chief Justice did not say: "This Court will examine the proceedings of all persons or bodies entrusted by Parliament with powers," or "with powers which may result in affecting people's rights," as all powers must do. The word used is "jurisdictions," and the meaning of that word in that judgment is to be found in another part of the judgment. It was a case in which the question was whether certiorari should go to bring up an order of justices made under statutory rating powers; and counsel had argued that no certiorari could go for the reason, among others, that no certiorari lies to remove orders made by Commissioners of Bankrupts; and upon that the Court observed: "As to the Commissioners of Bankrupts he said, that they had only an authority, and not a jurisdiction." That is precisely the point which arises here. I think that the Church Assembly has authority, exceedingly wide and important authority, but nothing that can properly be called jurisdiction. These observations apply a fortiori to the Legislative Committee of the Church Assembly. I cannot understand how it could even be argued that that body has any power to decide people's rights, or determine questions affecting the rights of subjects. That body appears to be no more than machinery by means of which the Church Assembly establishes contact with Parliament.

Rules discharged.

Solicitors for the Church Assembly: *Gregory, Rowcliffe & Co.*

Solicitors for the applicant: *Wainwright & Co.*

(1) (1700) Ld. Raym. 580.

F. P. F.

[IN THE COURT OF APPEAL.]

C. A.
1927
Nov. 11.

KONSKIER *v.* B. GOODMAN, LIMITED.

[1926. K. 781.]

Trespass—Building Operations—Rubbish falling on Land—Licence—Duty to remove—Subsequent Purchaser—Negligence—Continuing Trespass.

A firm of builders and contractors, engaged in pulling down the upper storeys of a house in a certain street, obtained from the then owner and occupier of the adjoining house, No. 87, a licence to pull down part of the chimney stack of No. 87, in consideration of which they undertook to rebuild it and to make good any damage caused to No. 87 in doing any of the works. In June, 1926, they finished the work of pulling down and rebuilding, but they omitted to remove a quantity of rubbish which they had allowed to fall on the roof of No. 87. In course of time this rubbish, being carried down by a drain pipe from the roof, choked a gully in the basement of No. 87. In July, 1926, the plaintiff became the tenant of No. 87. In September, 1926, a heavy storm of rain flooded the basement of that house owing to the gully being stopped.

In an action by the plaintiff against the builders :—

Held, that the defendants were not liable in an action of negligence, inasmuch as they owed no duty to the plaintiff, who had no interest in the premises at the time when their breach of the duty to remove the rubbish was committed ; but that in allowing the rubbish to remain beyond a reasonable time after their work was finished they were guilty of a trespass, which was continuing when the plaintiff became the tenant of No. 87, and that they were liable on that account.

Hudson v. *Nicholson* (1839) 5 M. & W. 437 followed.

Judgment of Salter J. affirmed on different grounds.

APPEAL from the judgment of Salter J. in an action tried before the learned judge without a jury.

The plaintiff was a dressmaker carrying on business at 87 and 88 Houndsditch. He claimed 119*l.* 11*s.* 6*d.* for damage done to the basement of his premises and to his stock of gowns and blouses therein through the alleged negligence of the defendants in the following circumstances : In the year 1926 the defendants, a firm of builders and contractors, were engaged in pulling down the upper portion of No. 84 Houndsditch, which adjoined No. 87. In March, 1926, Max Konskier, the owner and at that time the occupier of No. 87, had given to the London & Northern Estates Company, Ld., the then owners of No. 84, a licence to pull

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down part of the chimney stack which was a continuation of the party wall separating No. 84 from No. 87. The terms on which the licence was given were contained in the following agreement, dated March 4, 1926: "In consideration of your giving us permission to pull down at our expense the chimney stack of your premises No. 87 Houndsditch to within 3 ft. of the existing roof of your building nod. 87 Houndsditch aforesaid We the London & Northern Estates Company, Limited, hereby undertake at our own expense (*a*) to restore the said chimney stack to its present height at any future period or when the adjoining property is rebuilt on receiving a written request from you to this effect and (*b*) to make good any damage which may be caused to No. 87 Houndsditch by all or any of the before mentioned works." . . . .

Acting under the licence the defendants in the early part of 1926 pulled down part of the chimney stack and party wall and rebuilt them and completed that work in June, 1926; but they left upon the roof of No. 87 a quantity of rubbish and debris which they ought to have cleared away. In July, 1926, Max Konskier let Nos. 87 and 88 to the plaintiff, who was his son. The roof of No. 87 was drained by a four-inch drain pipe which ran down through the house to a gully in the basement. The gully became choked by pieces of rubbish and debris which had been carried down the pipe by rain water. On September 1 a heavy storm of rain occurred, and the water which should have flowed through the gully flooded the basement and damaged the stock.

The defendants denied negligence and charged the plaintiff with contributory negligence. At the trial they contended that they owed no duty to the plaintiff, who had not come into possession of the premises until after the alleged negligence had been committed. The learned judge negatived contributory negligence, and held, first assuming that the defendants owed a duty to the plaintiff, that there had been a breach of that duty. Then coming to the question whether there was such a duty, he said: "I am not able to accept the contention that there is no evidence here of a duty owing by the defendants

to the plaintiff. When they did the work and finished it there was a duty upon them to all persons who were using or had property upon the premises No. 87. The plaintiff was not at that time a person who had property, so far as I know, in that house. But this was an act of negligence continuing at the time when the plaintiff became lessee and brought property to the house. At that time I am satisfied that there was a duty owing to him, and that he is entitled to compensation if he sustains damage in consequence of the breach of it." He therefore gave judgment for the plaintiff and directed that the amount of damages should be found by an Official Referee.

The defendants appealed.

Hilbery for the appellants. First, this was not an action of trespass. It was treated from the writ to the judgment as an action of negligence. Therefore in order to succeed the respondent had to show a breach of some duty owed by the appellants to him: *Dickson* v. *Reuter's Telegram Co.* (1); *Le Lievre* v. *Gould* (2); *Cavalier* v. *Pope.* (3) The only negligence alleged or proved was that the appellants left the premises in June, 1926, without having removed the rubbish which had fallen upon the roof of No. 87. To whom did they owe a duty to remove it? To the respondent's father possibly, but surely not to the respondent, who had nothing to do with the premises until July, after the breach of duty was committed. A purchaser of land cannot sue for an act of negligence affecting the land before he became a purchaser. There was no fraud here, as there was in *Langridge* v. *Levy* (4); and no invitation to use a dangerous article, as there was in *George* v. *Skivington.* (5)

Secondly, an action of trespass would not lie in this case. It was not a wrongful act to allow rubbish to fall upon the roof of No. 87, because the appellants had the leave and licence of the respondent's father, who was then the occupier

(1) (1877) 3 C. P. D. 1.
(2) [1893] 1 Q. B. 491.
(3) [1906] A. C. 428.
(4) (1837) 2 M. & W. 519.
(5) (1869) L. R. 5 Ex. 1.

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of No. 87, to do work in the course of which the falling of rubbish upon the roof could not be avoided. Therefore the fall of the rubbish was covered by the licence and was not a trespass. What followed—namely, the omission to remove the rubbish—was merely a non-feasance and therefore no trespass.

[SCRUTTON L.J. referred to *Hudson* v. *Nicholson* (1); *Holmes* v. *Wilson* (2); and *Bowyer* v. *Cook*. (3)]

The two last named cases merely followed *Hudson* v. *Nicholson* (1), and in that case the original act was a trespass. In this case the original act of allowing the rubbish to fall on the roof was not a trespass.

Blanco White for the respondent. The learned judge was right in holding that the appellants owed a duty to the respondent to remove the rubbish from the roof of No. 87. Proximity to the property of others is sufficient to raise a duty to take reasonable care: *Le Lievre* v. *Gould*, per Lord Esher M.R. (4) One who places rubbish on land which is not his own owes a duty to the occupier for the time being to remove it.

Secondly, if the undisputed facts show a cause of action in trespass the Court may deal with the case as one of trespass, although it may not have been so pleaded or argued.

Hilbery in reply cited Beven on Negligence, 3rd ed., pp. 412, 413, and *St. Helen's Smelting Co.* v. *Tipping* (5), per Lord Westbury L.C.; and *Herring* v. *Metropolitan Board of Works* (6), per Byles J., there referred to.

SCRUTTON L.J. [after stating the facts:] The plaintiff in this case claimed damages for injury to his premises, Nos. 87 and 88 Houndsditch, and to his goods therein, caused by the negligence of the defendants' servants in pulling down adjoining premises and part of his own premises, and by mortar and debris left by the defendants and their servants on the roof of No. 87 after doing the work as aforesaid. In

(1) 5 M. & W. 437.
(2) (1839) 10 A. & E. 503.
(3) (1847) 4 C. B. 236.
(4) [1893] 1 Q. B. 491, 497.
(5) (1865) 11 H. L. C. 642, 650.
(6) (1865) 19 C. B. (N. S.) 510, 525; 34 L. J. (M. C.) 224, 227.

para. 2 of his statement of claim he alleged that the defendants, in executing the said demolition, negligently and wrongfully caused and permitted debris to fall and remain upon his premises so that it fell and was washed down by rain into the gutters of the premises and completely choked the gully in the basement thereof; and, in para. 3, he went on to state that on the morning of September 1, 1926, a heavy rainstorm occurred and the basement of his premises was filled with dirty water which did great damage to his stock of gowns and deprived him of the use of the basement while it was being cleared. It appears that counsel for the plaintiff in his opening speech stated that the claim was based on negligence, and the learned judge so dealt with the case. In the course of his judgment he said: "Was it negligent, assuming a duty, to leave the roof with this quantity of debris upon it? I cannot entertain a moment's doubt about that. It cannot have been the exercise of proper care and skill to leave the roof in such a condition as that. In asking myself how the flood was caused I have the evidence of Mr. Coles, which was very plain and probable, and, on the other hand, I only have the evidence of workmen who were on the roof, and people who say they cannot imagine how this"—the flooding—"can have happened. Then I have assumed a duty, and I am not able to accept the contention that there is no evidence here of a duty owing by the defendants to the plaintiff. When they did the work and finished it . . . . there was a duty upon them to all persons who were using or had property upon No. 87. The plaintiff was not at that time a person who had property, so far as I know, in that house. But this was an act of continuing negligence, and that negligence was continuing at a time when the tenant became lessee and brought property to the house." Mr. Hilbery contended that the case must be treated as one of negligence or nothing; and that there was no continuing negligence, because at the time of the acts or omissions complained of there was no duty owed by the defendants to the plaintiff who did not become tenant until afterwards; that the duty owed by the defendants was owed to the person who was

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tenant of the house in June, 1926, and there can be no continuing negligence without a continuing duty. That contention seems to be sound, but it does not dispose of another cause of action, a cause of action arising upon the undisputed facts of the case. If it was a trespass to leave the rubbish on the roof, it was a continuing trespass at the time when the plaintiff became tenant of the property. Mr. Hilbery says there was no trespass, because at the time when the rubbish fell upon the roof the defendants had a right to put it there provided that the falling of rubbish upon No. 87 was a reasonable incident of the work they were doing. But they had no more than a limited licence and were bound to remove the rubbish when their work was finished; and if they did not remove it within a reasonable time after the work was done, they could not and cannot now contend that the rubbish was lawfully there. By failing to remove it they rendered themselves substantially trespassers and the trespass was a continuing trespass. But a new occupier entering upon premises on which there is a continuing trespass has a cause of action in trespass in respect of it: *Hudson* v. *Nicholson.* (1) There certain shores and timbers had been placed by the defendants and others wrongfully and injuriously upon certain land before the plaintiff became possessed of it; and the defendants so kept and continued the shores and timbers upon the land after the plaintiff came into possession, although they were requested by the plaintiff to remove them. The plaintiff brought an action upon the case and delivered a declaration which contained no allegation of vi et armis and was in point of form framed in case and not in trespass. The question arose whether the plaintiff, who at the time of the wrongful act was not in possession, could bring an action on the case. Lord Abinger C.B. in delivering judgment said (2): "I still adhere to the opinion that this is properly the ground of an action of trespass, and not of case. It is not similar to those cases that have been cited, of trespass to a personal chattel, where trespass and case are concurrent remedies,

(1) 5 M. & W. 437. (2) 5 M. & W. 445.

and where a party may waive the trespass and go for the consequential damage." The point having been raised after verdict the Court of Exchequer discharged a rule for a new trial. It follows from that case that if the present action had been brought in trespass there would have been no answer to the claim. But a plaintiff is not now bound to state the legal effect of the facts on which he relies; he is only bound to state the facts themselves, and we cannot see that the respondent has suffered any injustice in the way of being shut out from giving evidence which he might have given if the action had been treated as an action of trespass. We therefore think that the judgment should stand as a judgment in an action of trespass and that the appeal should be dismissed, but without costs.

SARGANT L.J. I am of the same opinion. The judgment of the learned judge confirms the statement that the case was argued in the Court below as raising a question of negligence and nothing else, and that the point was whether a duty was owed not only to the plaintiff's father, who was the owner and occupier of the premises while the work was being done and after it had been completed, but to the plaintiff also, who came into possession subsequently. After hearing the arguments that have been addressed to this Court I cannot agree with the view of the learned judge that there was actionable negligence by the defendants consisting in a breach of a continuing duty owed to the plaintiff. In holding that there was continuing negligence I think the learned judge leaped over the gap between the father and the son, who did not become tenant until a later date. In so far as the action was based upon negligence there was a good answer to it, because in the circumstances no duty was owed to the plaintiff.

Still the plaintiff's father had given leave and licence to the defendants to do certain building work which involved scattering a certain amount of debris upon the roof of his premises. The terms on which the licence was granted would have justified them in allowing the rubbish to fall upon

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the premises and in removing it from the premises during the building operations, or within a reasonable time after they were finished. But from that time forward there was a trespass upon the premises, and when the plaintiff became the occupier of them he was entitled to complain of a continuing trespass and for damage to his stock consequent thereon. I agree that the appeal should be dismissed.

GREER L.J. I agree. It is well established that in order to succeed in an action of negligence the plaintiff must prove that the damage arose from a breach of some duty to himself; he cannot recover for neglect of a duty owed to some other person. This is a clear case for the application of that principle. It is not like *Langridge* v. *Levy* (1), where the cause of action was fraud. Accordingly, if this action is merely one for negligence the defendants ought to succeed. Equally if it is an action for trespass, the plaintiff ought to succeed. The defendants' act of allowing rubbish to fall and remain on the plaintiff's premises would have been a trespass but that it was done under a licence permitting it for the time being; but when the licence came to an end the act was as much a trespass as if there had been no licence.

Appeal dismissed.

Solicitors for appellants: *Harris, Chetham & Cohen.*
Solicitors for respondent: *Kenneth Brown, Baker, Baker.*

(1) 2 M. & W. 519.

W. H. G.

[IN THE COURT OF APPEAL.]

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[1927. S. 3255.]

Practice—Payment into Court—Several Causes of Action—One Payment in respect of all—Inadequate Damages—New Trial—Rules of Supreme Court, Order XXII.

A plea of payment into Court, under Order XXII. of the Rules of the Supreme Court, of one sum in satisfaction of two or more separate and distinct causes of action put in suit by several plaintiffs upon one writ, without specification of the claims or causes of action in respect of which the payment is made, is a bad plea.

Paraire v. *Loibl* (1880) 49 L. J. (C. P.) 481 explained; *Boulton* v. *Houlder Brothers & Co.* (1903) 9 Com. Cas. 75; 19 Times L. R. 635; *James Tucker Steamship Co.* v. *Lamport* (1906) 23 Times L. R. 10; and *Weber* v. *Birkett* [1925] 2 K. B. 152 followed; *Benning* v. *Ilford Gas Co.* [1907] 2 K. B. 290 overruled.

The Court of Appeal may set aside the assessment of damages by a jury where the amount assessed is so small or so large as that twelve sensible jurors could not reasonably have given the verdict, or as to lead the Court to the conclusion that the jury must have taken into consideration matter which they ought not to have considered, or that they have omitted to pay regard to matter which they ought to have considered.

Phillips v. *London and South Western Ry. Co.* (1879) 5 Q. B. D. 78; *Praed* v. *Graham* (1889) 24 Q. B. D. 53; and *Johnston* v. *Great Western Ry. Co.* [1904] 2 K. B. 250 followed.

Three persons, a husband and his wife and daughter, brought one action against the owner of a motor van for the negligence of his servant in causing a collision between the van and a motor cycle having a side car attached thereto, which the male plaintiff was driving and in which the other plaintiffs were riding, whereby the wife and daughter were injured, the wife severely and the child slightly, and the vehicle was damaged. The defendant denied negligence, alleged contributory negligence on the part of the male plaintiff, and pleaded alternatively that without admitting liability he brought a sum of money into Court and said that it was enough to satisfy the plaintiffs' claims. The jury found that the defendant was negligent and that the male plaintiff was guilty of contributory negligence, and they assessed the damages at 15*l.* for the wife and 5*l.* for the child. The judge at the trial, although dissatisfied with the verdict of 15*l.* as being inadequate, entered judgment for the wife for 15*l.* and for the child for 5*l.*, with costs in each case up to the date of the payment into Court.

The Court of Appeal set aside the verdict for 15*l.* and, assessing the wife's damages with the consent of the parties, gave judgment for the wife for 60*l.* and gave both the wife and the child their full costs of the action on the ground that there had been no valid payment into Court.

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APPEAL from the judgment of Swift J. in an action tried before the learned judge and a common jury.

The action was brought by three plaintiffs, husband, wife and daughter, against the defendant for the negligence of his servant in the driving and management of a motor van whereby the plaintiffs, who were in a side car, were injured. The defendant denied negligence, alleged contributory negligence on the part of the male plaintiff, and, as an alternative defence, brought into Court the sum of 150*l.* with a denial of liability, and said that that sum was enough to satisfy the whole of the plaintiffs' claims. The jury found that the male plaintiff was guilty of contributory negligence, and in respect of his claim judgment was entered for the defendant with costs. The jury also found that the defendant was guilty of negligence, and so, after the learned judge had directed them that the wife and daughter were not identified with the male plaintiff so as to make his negligence contributory to their injuries, the jury found a verdict of 15*l.* for the wife and 5*l.* for the child. The wife's injuries were serious. The husband paid the expense of her treatment and included this in his claim for special damage, which he failed to recover, as the jury found it was the result of his own negligence. The daughter's arm was broken; it was a simple fracture. The amount awarded to her, though small, could not be challenged. But with regard to the damages awarded to the wife the learned judge said: "In my opinion they are totally inadequate. She sustained a fractured shoulder blade; she was rendered unconscious; she was kept in hospital and was for three months under the care of her own doctor, and she was prevented for a considerable time from following her occupation, and even now she still suffers as a consequence of the accident. I have no doubt whatever that the figure of 15*l.* was arrived at by a compromise and is distinctly unfair to the plaintiff Mrs. Smith. But I do not know what I can do with regard to the matter. If it is to be set right, as it ought to be, it must be done by the Court of Appeal." Accordingly he gave judgment for the wife for 15*l.* and for the daughter for 5*l.*

with costs in each of these cases up to the date of payment into Court.

The plaintiffs appealed.

W. E. Batt for the appellants. The verdict of 15*l.* for Mrs. Smith cannot stand. It is not such a verdict as twelve sensible men could reasonably have given: *Praed* v. *Graham* (1); unless they had taken into account some matter which they ought not to have considered: *Johnston* v. *Great Western Ry. Co.* (2); *Taff Vale Ry. Co.* v. *Jenkins* (3), per Lord Atkinson. This was the opinion of the learned judge at the trial, a matter which the Court of Appeal takes into serious consideration: *Webster* v. *Friedeberg.* (4)

With regard to the costs of the wife and child, they were entitled to their costs of the action, and not merely their costs up to the date of the payment into Court. The defendant's plea of payment was a bad plea, in that the claim or cause of action in respect of which it was made was not specified in the defence, as Order XXII., r. 2, directs that it shall be. Upon the question whether absence of a specification invalidates the plea the cases are in conflict, but the weight of authority inclines to the conclusion that one payment made generally in respect of several causes of action will not support a plea of payment: *Boulton* v. *Houlder Brothers & Co.* (5); *James Tucker Steamship Co.* v. *Lamport* (6); *Weber* v. *Birkett* (7), disapproving of *Benning* v. *Ilford Gas Co.* (8) Therefore there has been no valid payment into Court; the verdict for the wife should be set aside, and unless the parties can agree to leave the assessment of her damages to the Court there must, it is submitted, be a new trial; but in any case she is entitled to the whole of her costs of the action.

J. B. Melville K.C. and *R. O. Mobbs* for the respondent. The rules of pleading are directory merely. For example,

(1) 24 Q. B. D. 53.
(2) [1904] 2 K. B. 250.
(3) [1913] A. C. 1, 7.
(4) (1886) 17 Q. B. D. 736.
(5) 19 Times L. R. 635; 9 Com. Cas. 75.
(6) 23 Times L. R. 10.
(7) [1925] 2 K. B. 152.
(8) [1907] 2 K. B. 290.

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Order XIX., r. 4, directs that every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies, but not the evidence by which they are to be proved. Yet if a pleading contains evidence it is not therefore a nullity. If a party objects to the pleading of an opponent his remedy is under Order XIX., r. 7. He may apply for a further and better statement or for further and better particulars.

[SARGANT L.J. He does not validate a bad pleading by not applying under that rule.]

The pleading is prima facie good: *Paraire* v. *Loibl* (1); *Benning* v. *Ilford Gas Co.* (2) As regards the amount of the verdict for Mrs. Smith there is nothing to show that the jury took into consideration any matter except the injury actually suffered by that plaintiff. All the expense caused by the accident was paid by the male plaintiff. The only matter the jury had to consider was the pain and suffering.

Counsel was not called upon in reply.

The Court intimated that they were disposed to order a new trial on the question of the wife's damages and to hold that the defendant's plea of payment into Court was a bad plea and could have no effect upon the costs of the action. The parties consented to the Court assessing the wife's damages, and they were assessed at 60*l.*, and the following judgments were then delivered.

SCRUTTON L.J. This case raises an important question of the validity of a payment into Court purporting to be made under Order XXII.

[The Lord Justice then stated the facts as above and proceeded:] Great attention is always paid to the view which the judge at the trial takes of the verdict of the jury. In the opinion of Swift J. the amount of 15*l.* awarded to Mrs. Smith was not arrived at by a genuine assessment of the damages suffered by her, but by a compromise between the views of various members of the jury, some of whom may have thought that

(1) 49 L. J. (C. P.) 481. (2) [1907] 2 K. B. 290.

the wife and daughter ought not to recover all their damages from one of two parties both of whom were negligent. The Court of Appeal is slow to interfere with the amount of damages found by a jury, and before it is induced to do so it must be satisfied that the jury have either taken into account matters which they ought not to have taken into account or have neglected or disregarded matters which they ought to have taken into account. I have come to the conclusion that in this case the jury must, for some not very obvious reason, have neglected or disregarded matter which ought to have been considered. Therefore the verdict of 15*l.* must be set aside. The question has sometimes arisen, when a jury have given a perverse finding on one point, whether their findings on other points should be allowed to stand; but upon the rest of the case we have no expression of opinion from the learned judge, and no material upon which we can interfere with the verdict of 5*l.* for the daughter. But a new trial of the wife's claim would have been necessary if the parties had not agreed that this Court should assess her damages.

Then how are the costs to be dealt with? At the trial the learned judge found stated in the defence the fact of one sum of 150*l.* paid in to satisfy the claims of all three plaintiffs. There were no means of ascertaining how much had been paid in respect of each plaintiff. It does not follow that, because one plaintiff recovered 15*l.* and another 5*l.*, therefore 130*l.* must have been paid in to satisfy the third and 15*l.* and 5*l.* to satisfy the other two. In the absence of authority the learned judge would have held that the payment into Court of one sum in respect of three causes of action was a bad plea of payment, but he was faced with *Benning* v. *Ilford Gas Co.* (1); neither *James Tucker Steamship Co.* v. *Lamport* (2) nor *Weber* v. *Birkett* (3) seems to have been cited to him, and so he ordered that Mrs. Smith should have her costs up to the time of the payment into Court. This raises the practical question, Is it a good plea of payment

(1) [1907] 2 K. B. 290. (2) 23 Times L. R. 10.
(3) [1925] 2 K. B. 152.

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into Court for the defendant to say he pays into Court one lump sum to satisfy three causes of action of three plaintiffs respectively? In *Paraire* v. *Loibl* (1) the plaintiff claimed one sum (*a*) for work done as an architect in preparing plans and specifications with a view to certain works and alterations to be executed on two properties belonging to the defendant, (*b*) for work done as an arbitrator. The defendant paid one sum into Court and pleaded payment into Court generally. The report states that Field J. ordered the defence to be amended by specifying in respect of which of the items of the plaintiff's claim the payment into Court had been made. It is not clear how far this report is accurate. A judge cannot order a party to amend his pleading, though he can impose terms upon him if it is not amended. The Common Pleas Division reversed this order. The Court of Appeal affirmed the order of the Common Pleas Division. Bramwell L.J. said: "It might work a great injustice to the defendant if he was compelled to specify how much he had paid into Court in respect of each item. He might be unable so to particularize, where he had paid sums from time to time on account, and the plaintiff was suing for a balance. . . . . I say nothing about the plaintiff's right to particulars from the defendant as to the money he has paid into Court." That seems to imply that the payment into Court would stand as a plea if not objected to, but that in certain circumstances it might be embarrassing and objectionable on that ground. At any rate Bramwell L.J. does not seem to have considered it so defective that it could be treated as a nullity. Another case is *Boulton* v. *Houlder Brothers & Co.* (2), where a firm of shipowners of the highest reputation were accused of preparing and laying before average adjusters accounts running through a series of years and containing overcharges alleged to have been made deliberately for the purpose of defrauding the plaintiffs, who were underwriters. A claim was made against them for 150,000*l.*, which however was, as the result of various orders of the Court, reduced to 17,000*l.* The defendants paid 1500*l.* into Court denying liability. The plaintiffs

(1) 49 L. J. (C. P.) 481, 482. (2) 19 Times L. R. 635; 9 Com. Cas. 75.

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then asked for an order for detailed particulars of the various sums constituting the 1500*l*. Mathew L.J. held that there was no rule of law precluding an order for particulars of the items of a sum paid into Court, and that it was a matter of discretion whether an order should be made. In the circumstances of that case, one of which was that the defendants in their pleadings offered to repay any overcharges that had been made, it was ordered that they should give the best particulars they could of the items in respect of which overcharges were admitted. That seems to give weight to the point which Bramwell L.J. reserved in *Paraire* v. *Loibl.* (1) The next case was *James Tucker Steamship Co.* v. *Lamport* (2), where shipowners claimed against charterers (*a*) freight under the charterparty, (*b*) a sum overpaid to the charterers' stevedores, and (*c*) demurrage. The defendants denied liability, but brought 250*l*. into Court and said that was enough to satisfy the plaintiffs' claim. The judge in chambers ordered particulars of the sum brought into Court. Mr. Maurice Hill contended that the defendants ought not to be ordered to give particulars. Cozens-Hardy L.J. said "that in his opinion the order of the learned judge was right. He did not decide the case simply on the authority of *Boulton* v. *Houlder Brothers & Co.* (3), but upon what seemed to him to be the true construction of the rules and orders. This was not a case merely of separate items of damage, but a case of separate and distinct causes of action. The rules by their language required that a defendant should state in respect of what cause of action he paid money into Court. A defendant could not pay money into Court and say it was in respect of several causes of action." Farwell L.J. gave judgment to the same effect. That is a clear authority that a payment into Court of one sum in respect of several causes of action is a bad payment. It seems to be in conflict with the other cases in the Court of Appeal. In the next year *Benning* v. *Ilford Gas Co.* (4) came before Darling and Phillimore JJ. A number of mortgagees of small houses made separate claims against landowners

(1) 49 L. J. (C. P.) 481.
(2) 23 Times L. R. 10, 11.
(3) 19 Times L. R. 635; 9 Com. Cas. 75.
(4) [1907] 2 K. B. 290.

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in the neighbourhood for obstructing a watercourse. One and the same act caused damage to all the plaintiffs, but the amount of damage suffered by each would be different. The defendants paid into Court 100*l.* generally. The case was sent for trial before an Official Referee. The plaintiffs were awarded various sums ranging between 18*l.* and 1*l.* and amounting in all to 79*l.* 10*s.*, being less than the amount paid in. The Official Referee gave judgment for the defendants with costs from and after the date of the payment into Court, and allowed the plaintiffs their costs up to that date. The plaintiffs appealed, and insisted that they should have the costs of the action, inasmuch as the payment into Court was a nullity. Counsel for the plaintiffs cited a case tried before Phillimore J. himself at the Bodmin Assizes, *Hellings* v. *West End Drapery Stores* (1), where a husband claimed damages for loss of consortium and the wife claimed for personal injuries, and the defendants paid one lump sum into Court; in which case Phillimore J. had held that the payment into Court was bad because there were two different causes of action. Yet in *Benning* v. *Ilford Gas Co.*(2) the two judges in the Divisional Court, ignoring the decision of *James Tucker Steamship Co.* v. *Lamport* (3), which was cited to them, took the view that by not applying for particulars the plaintiffs had in effect cleared the plea of any imputation of unsoundness; and they upheld the order of the Official Referee. Darling J. said (4), "I think the true view is that this is a good payment prima facie. No doubt it may in certain cases prove inconvenient and possibly embarrassing to the plaintiffs in an action constituted as this action is. But the real answer to that objection is that in cases where plaintiffs are embarrassed by such a proceeding they have their remedy in their own hands . . . ."—namely, by applying for an order that the defendant should distribute the payment—"No such step was taken by the plaintiffs in the present case. . . . . In my view they cannot now successfully urge that the payment was bad from the beginning." Phillimore J. distinguished

(1) (1889) Unreported.
(2) [1907] 2 K. B. 290.
(3) 23 Times L. R. 10, 11.
(4) [1907] 2 K. B. 294.

Hellings v. *West End Drapery Stores* (1) on the ground that there was in existence, before r. 1 of Order XVI. was amended, a Rule of Court, Order XVIII., r. 4, which enabled a husband and wife to bring two actions on one writ. So matters stood until *Weber* v. *Birkett* (2) in which *Benning* v. *Ilford Gas Co.* (3) came up for consideration. *Weber* v. *Birkett* (2) was an action for slander and libel. The defendant pleaded an apology, and paid into Court 105*l.* in satisfaction of both the libel and the slander without distinction. On being required to state how much was to be attributed to each cause of action respectively, he amended his pleading and paid in another sum of 105*l.* and allocated 105*l.* to each cause of action. At the trial the Lord Chief Justice directed the jury to find separately the amount to which the plaintiff was entitled for the libel and for the slander respectively. The jury found a single sum of 200*l.* and said they could not discriminate. When asked if they meant to attribute 100*l.* to each cause of action they disclaimed any such intention, and said they could not assess any sum in respect of either cause of action separately. The defendant then applied for leave to amend his defence by pleading that 210*l* was paid in generally in satisfaction of both causes of action, but the application was refused. The question then was whether the verdict could stand. The Lord Chief Justice held that the verdict was bad, and he declined to enter judgment for either party. The Court of Appeal held that the Chief Justice had taken the only possible course. That disposed of the real point in the case, but two of the Lords Justices commented on *Benning* v. *Ilford Gas Co.* (3) Bankes L.J., referring to the opinion of Darling J. that the payment into Court in *Benning's* case (3) was "a good payment prima facie" said (4): "I think that statement of the learned judge is not consistent with the authorities to which I have referred, and is not good law." Atkin L.J. said (5): "With regard to *Benning* v. *Ilford Gas Co.* (3) I may say that in my opinion that case must be regarded

(1) Unreported.
(2) [1925] 2 K. B. 152.
(3) [1907] 2 K. B. 290.
(4) [1925] 2 K. B. 156.
(5) [1925] 2 K. B. 157.

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as of very doubtful authority in view of the language of the rule and the earlier decisions upon it." I said nothing about *Benning's* case (1), but merely expressed the view that the verdict was no verdict and that it was quite impossible to make the amendment that had been asked for.

In view of the conflict between *Paraire* v. *Loibl* (2) on the one hand and *James Tucker Steamship Co.* v. *Lamport* (3) and *Weber* v. *Birkett* (4) on the other, all three being decisions of the Court of Appeal, this Court is at liberty to consider and decide for itself whether *Benning* v. *Ilford Gas Co.* (1) is good law. I have come to the conclusion that it is not law, and that a plea of payment of one sum into Court in respect of different causes of action put in suit by different plaintiffs is a bad plea and ought to be struck out. No doubt the defendant would as a rule be allowed the option of amending, but unamended it is a bad plea and ought not to serve as a point of departure up to or beyond which costs should be allowed or withheld. As the Rules of the Supreme Court stand at present, authorizing the joinder of various causes of action on one writ, but giving no directions specially applicable to the payment of money into Court in actions so constituted, difficulties will constantly arise where one sum is paid into Court. In the present case a new trial would have been necessary but for the agreement of the parties. In the circumstances which have happened there will be judgment for the defendant in the husband's claim. The verdict for the wife for 15*l.* is set aside and she will have judgment for 60*l.* As there was no valid payment into Court the wife will have her full costs of the action on the High Court scale. As the order for costs made in the daughter's case was bad for the same reason, the daughter will retain her judgment for 5*l.* and have full costs also on the High Court scale. The appeal will therefore be allowed.

SARGANT L.J. It is unnecessary for me to comment upon the authorities or to say more than that I concur with

(1) [1907] 2 K. B. 290.
(2) 49 L. J. (C. P.) 481.
(3) 23 Times L. R. 10.
(4) [1925] 2 K. B. 152.

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what Scrutton L.J. has said upon them and that, so far as this Court is concerned, the question is at large, but that the balance of authority is in my view slightly in favour of holding that this payment into Court is bad. That being so the Court may put its own construction upon Order XXII., r. 2. To my mind the words of that rule are clear: "Payment into Court shall be signified in the defence, and the claim or cause of action in satisfaction of which such payment is made shall be specified therein." It may be that where a single plaintiff sues for an aggregate sum composed of separate items the separate items can be regarded as separate claims or the aggregate sum as one debt, and that payment of one sum into Court would be taken as made in respect of that debt. But where separate plaintiffs, each with a separate cause of action, are joined in one writ the rule would be violated if the defendant were allowed to pay one sum into Court in respect of all the causes of action. With regard to *Benning's* case (1) I agree that the decision in that case is not law. The result of that is to reinstate the judgment of Phillimore J. in *Hellings* v. *West End Drapery Stores* (2), which was in accordance with the plain meaning of Order XXII., r. 2, and it must be taken that one payment into Court made in the circumstances of this case is invalid. A plaintiff might be most illegitimately embarrassed if such a payment were permitted. There is one other point I wish to refer to. Mr. Melville said it was the general practice to apply for particulars when a payment of this character was made. But no amount of practice will modify the meaning of the rule itself, and the practice itself so far as it exists is not in conflict with the rule, for when met with a payment like that in the present case a plaintiff may choose to take the less stringent course of applying for particulars and by so doing waive the prima facie right to insist that the payment is bad. But even though that course is often taken, the exercise and enforcement of the strict order still remains open and available for a plaintiff who is not content with particulars but prefers to insist on its terms.

(1) [1907] 2 K. B. 290. (2) Unreported.

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GREER L.J. I agree, and have little to add. First with reference to the power of the Court to interfere with the verdict of a jury, the rule to be deduced from *Phillips* v. *London and South Western Ry. Co.* (1); *Praed* v. *Graham* (2); and *Johnston* v. *Great Western Ry. Co.* (3) may be stated thus: The verdict may be set aside if the Court of Appeal upon all the circumstances comes to the conclusion that the damages awarded are so small or so large that twelve sensible jurors could not reasonably have awarded them; or if the Court is satisfied that the jury have taken into account matters which they ought not to have taken into account or have disregarded matters which they ought to have taken into account. In the present case the verdict of 15*l.* seems to me so small that it was not a verdict which twelve sensible men could reasonably have given, or if that is not the true explanation, it must be that the twelve men have given weight to matters which they ought not to have taken into account. Secondly, was the payment into Court a valid payment? The language of Order XXII., r. 2, especially when read with the subsequent rules showing what the plaintiff may do upon payment into Court by the defendant—for example, under rr. 6 and 7, accept the sum in satisfaction of the claim or cause of action in respect of which it was paid,—leads to the conclusion that a payment into Court is necessarily bad unless it states in respect of what claim or cause of action it is made; because the plaintiff is entitled to elect whether any and which of the claims or causes of action shall proceed to trial. Therefore if there were no authority upon the meaning of r. 2, and I had merely to consider its wording, I should have no doubt that the payment into Court in this case was invalid. But a number of authorities have been cited, some of which seem to throw doubt upon the meaning of the rule. After the judgments which have been delivered I need only deal with one of these: *Paraire* v. *Loibl.* (4) In my opinion we are entitled to treat that case merely as a decision that the Master or judge in chambers may order the necessary particulars

(1) 5 Q. B. D. 78.
(2) 24 Q. B. D. 53.
(3) [1904] 2 K. B. 250.
(4) 49 L. J. (C. P.) 481.

to be given if the pleading does not contain them. There is no power to order a litigant to amend his pleading, though in a proper case terms may be imposed upon him if an order for particulars is not complied with. I agree with what has been said upon the other cases cited.

Appeal allowed.

Solicitor for appellants: *J. Albert Davis.*

Solicitors for the respondent: *A. E. Hewitt & Crane.*

W. H. G.

BROOKS AND OTHERS *v.* LIFFEN.

1927
Nov. 17.

Landlord and Tenant—Rent Restriction—"Decontrol"—Rent of Dwelling-house less than two-thirds of rateable Value—Application of Rent Restriction Act, 1920, *"as if no such tenancy existed"—Possession by Tenant on July* 31, 1923*—Whether Tenant to be deemed to be Landlord—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 7*—Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 1.

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 7: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed."

By the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1: "Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act [July 31, 1923] . . . . then from and after the passing of this Act . . . . the principal Act [i.e., the Act of 1920] shall cease to apply to the dwelling-house."

The defendant was the tenant under a long lease of a dwelling-house belonging to the plaintiffs to which the Rent Restriction Acts applied at a rent which was less than two-thirds of the rateable value of the house. On July 31, 1923, he was in possession of the whole of the house:—

Held, that, although s. 12, sub-s. 7, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provided that that Act was not to apply to the tenancy and was to apply in respect of the house as if the tenancy had never existed, the defendant was not to be deemed to be the "landlord" of the house on July 31, 1923, so that it then became "decontrolled" by reason of his possession of the whole of it at that date.

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APPEAL from Westminster County Court.

In 1904 the defendant became lessee of a dwelling-house known as 15 Gillingham Street, Pimlico, S.W., under an assignment of a lease for ninety-eight years, which had twenty years of its term unexpired. The net rateable value of the house, of which the plaintiffs were the freeholders, was 38*l.*; the rent reserved under the lease was 5*l.* a year. On July 31, 1923, the date of the passing of the Rent and Mortgage Interest Restrictions Act, 1923, the defendant was in occupation of the whole of the house. By letters passing between the parties in June, 1924, it was agreed that, after the expiration of the long lease in June, 1924, the defendant should retain possession of the house as a quarterly tenant at a rent of 56*l.* a year. The defendant remained in possession under that agreement. In November, 1926, a notice to quit determining the quarterly tenancy as from March 25, 1927, was served on the defendant by the plaintiffs. The defendant refused to leave the house, and the plaintiffs began this action in the county court to recover possession of it. The defendant contended that he was protected by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and the county court judge decided in his favour.

The plaintiffs appealed.

Bensley Wells for the plaintiffs. The decision of the county court judge was wrong. The plaintiffs were entitled to recover possession of the house from the defendant, because it had become "decontrolled" by reason of its occupation on July 31, 1923. The effect of s. 12, sub-s. 7, of the Act of 1920 is that the tenancy between the plaintiffs and the defendant must be ignored for the purposes of the Rent Restriction Acts since the rent payable in respect of that tenancy was less than two-thirds of the rateable value of the house. In *Finey* v. *Gougoltz* (1) (in which the opinion of Lord Darling in *Jenkinson* v. *Wright* (2) was approved and followed) it was held that a tenant holding under a long lease at a rent less than two-thirds of the rateable value of

(1) [1926] 2 K. B. 322. (2) [1924] 2 K. B. 645.

the house was to be deemed to be the "landlord" of the house within s. 2, sub-s. 1, of the Act of 1923. Taking the two sections and the decision in *Finey* v. *Gougoltz* (1) together, the result is that the defendant must be deemed to have been the landlord of the house on July 31, 1923. He was in possession of the whole of it at that date and, therefore, the Rent Restriction Acts then ceased to apply to it. *Finey* v. *Gougoltz* (1) cannot be distinguished from the present case merely because there a room in the house had been let after the house had become decontrolled. If that were so, not the possession of a house by the landlord on July 31, 1923, but the subletting of part of it after that date would be the reason for the house becoming decontrolled.

J. Ronald Walker for the defendant was not called on to argue.

SALTER J. The question for our decision in this case is whether or not this dwelling-house had been decontrolled in June, 1924, when it was let to the defendant on a quarterly tenancy. Every matter which arises under those parts of the Rent Restriction Acts which deal with tenancy is a matter between landlord and tenant—either between contractual landlord and contractual tenant, or between statutory landlord and statutory tenant—and every such matter must also relate to a dwelling-house which is the subject of tenancy between a landlord and a tenant. It is important, in considering cases under the Rent Restriction Acts, to bear in mind who is the landlord and who is the tenant and what is the dwelling-house for the purpose of a particular decision.

This case depends on the construction of s. 12, sub-s. 7, of the Act of 1920 and of s. 2, sub-s. 1, of the Act of 1923. In the light of s. 12, sub-s. 7, of the Act of 1920 I ask myself what is to be regarded as the legal position on July 31, 1923, of the parties to this action with reference to the dwelling-house which is its subject-matter. Sect. 12, sub-s. 7, directs us to shut our eyes to the fact of an existing tenancy. It does not direct us to shut our eyes to anything else. It is

(1) [1926] 2 K. B. 322.

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admitted that on July 31, 1923, the plaintiffs were the owners of this dwelling-house and that the defendant was in occupation of the whole of it. We must, however, say, for the purpose of these Acts, that no relationship of landlord and tenant existed between them. They were owners and occupier. The defendant must be regarded as having been rightly on the premises and, therefore, a licensee.

Was the landlord of this dwelling-house in possession of it on July 31, 1923, within s. 2, sub-s. 1, of the Act of 1923? The word "landlord" must be loosely used in that sub-section because, strictly speaking, there cannot be a landlord without a tenant and a tenure and the sub-section deals with a case where there is neither tenant nor tenure. "Landlord" clearly must mean nothing more than "owner." Were the owners of this dwelling-house in possession of it on July 31, 1923? The defendant was certainly not the owner and, in my view, he certainly was not the landlord. In fact, he was the tenant, but we are not allowed to say so. The plaintiffs were the owners and they were not in possession.

In my opinion it is quite plain that s. 2, sub-s. 1, of the Act of 1923 never came into operation as regards this dwelling-house and the Act of 1920 never ceased to apply to it. For these reasons I think that the county court judge was right and that this appeal fails.

TALBOT J. I am of the same opinion. An ingenious attempt has been made to apply s. 2, sub-s. 1, of the Act of 1923 in a way which is manifestly outside the contemplation of those who framed and enacted it. The object of the section is to confer certain rights on a man who is a landlord at the time when the question of his position as against a tenant arises, if he can show that he was in possession of, or took possession of, the dwelling-house at either of the times specified in the sub-section. The argument is that, because a tenant under a long lease, who has not sublet, would be a landlord if he did sublet, he is therefore to be deemed to be a landlord in relation to the freeholder who is in fact his landlord, for the purposes of this section which was passed with the

object to which I have referred. It is said that the freeholder can say to the person who is in truth his tenant: "You, my tenant, who would be in the position of a landlord if you sublet, were in possession on the critical date, and although I, who was your landlord then and am so now, was not then, and never have been, in possession, the premises are decontrolled and I can charge you what rent I like." That seems to me to be an entire perversion of the scope of this sub-section and a fallacious deduction from the fact that a tenant may in other proceedings be himself put in the position of a landlord. The argument is founded on s. 12, sub-s. 7, of the Act of 1920, and is that, because alio intuitu there is supposed to be no tenancy when the rent under a long lease is below a certain figure, the tenant is to be considered, in relation to a person who is in fact landlord, not a tenant, but a landlord. It is often possible, by looking at portions of Acts of Parliament outside their context and by disregarding the intention with which they have been passed, to construct erroneous interpretations of them. The argument to which we have listened depends on such a misinterpretation of this Act of Parliament.

There are certain authorities (one only of which has been quoted in support of the argument on behalf of the plaintiffs) which, I think, tell very much against it, but whether that be so or not, I know of no case which really supports the argument on behalf of the plaintiffs. The cases are all cases involving the consideration of a double capacity, that is to say, the position of a man who is in one relation a tenant and in another relation a landlord. This case is free from any such complication.

For these reasons I think that the county court judge was right in law, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Stephenson, Harwood & Tatham.*
Solicitor for defendant: *H. A. Phillips.*

G. F. L. B.

1927
Nov. 24, 25.

ROYAL ANTEDILUVIAN ORDER OF BUFFALOES *v.* OWENS.

Revenue—Income Tax—Exemption—Hospital—Convalescent Home—Maintenance by unregistered Friendly Society for its Members—Purchase by Fund subscribed by Members—No Expense borne by Patients—Income Tax Act, 1918 (8 & 9 *Geo.*, 5, *c.* 40), *Sch. A, No. VI., r.* 1 (*c*).

An unregistered friendly society which had a membership of over two million persons, who were mostly working men of small means, and, as its principal objects, the relief of distressed members and their dependants and the promotion of social intercourse and recreation among its members, bought for conversion into a convalescent home for its members certain premises which were conveyed to trustees upon trust to hold them for the society. The purchase price was subscribed by members of the society and money was lent from the general funds of the society for the equipment and maintenance of the home, which was furnished to accommodate from twenty to thirty patients. No expense was incurred by a patient, either for travelling to the home or during his residence there. There was a staff of nurses and servants at the home, and medical men gave their services gratuitously:—

Held, that, since the home could be regarded as an eleemosynary establishment maintained by the society for the benefit of a few of its members out of many it was a "hospital" within Sch. A, No. VI., r. 1 (*c*), of the Income Tax Act, 1918, and the society was, therefore, entitled to exemption from assessment to income tax in respect of the premises belonging to it.

CASE stated by General Commissioners of Income Tax.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the division of Droitwich held at the Court House, Bromsgrove, on December 21, 1926, the appellants, the Grand Council of the Royal Antediluvian Order of Buffaloes, appealed against an assessment under Sch. A of the Income Tax Act, 1918, for the year ended April 5, 1924, in the sum of 180*l.* gross (146*l.* 10*s.* net) in respect of premises at Redditch called "Holmwood," and owned and occupied by them. The appeal was on the ground that the premises, which were used as a convalescent home, were a "hospital" within the meaning of r. 1 (*c*) of No. VI. of Sch. A. (1)

(1) Rule 1 of No. VI. of Sch. A of the Income Tax Act, 1918, provides: "The following further allowances shall be made under this Schedule:— . . . . (*c*) the amount of the tax charged on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises belonging thereto. . . . ."

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At the hearing of the appeal the following facts were admitted or proved :—

The Royal Antediluvian Order of Buffaloes was an unregistered friendly society, which had for its principal objects the relief of distressed members and of the widows and orphans of members and the promotion of social intercourse and recreation in the lodges. The Order comprised minor lodges, grand lodges, and a Grand Council. There were nearly 2000 minor lodges, and the membership of the Order (which was confined to men) was estimated at over two million persons. A man wishing to join the Order was proposed by a member of the Order, who vouched for his character and, after he had been proposed and seconded and a short period had elapsed during which his credentials were inquired into, initiation took place into a minor lodge. When the initiate had remained a member of the Order for twelve months and had attended twenty-six times in his minor lodge he was entitled to participate in the full benefits of the Order. The administration of the Order was vested in grand lodges and a Grand Council. The grand lodges met once monthly in the district to which they were allocated, and each minor lodge sent two delegates to the grand lodges. Each grand lodge in turn sent one delegate to the Grand Council, which was the supreme governing authority and met once quarterly.

A member of the Order on attending his lodge paid a registration fee of not less than 3*d.*, unless his means were such as to make it impossible for this fee to be paid. Out of this fee the minor lodge contributed to the funds of the Order for each member as follows : ½*d.* for the Central Benevolent Fund ; ½*d.* for the Central Widows' and Orphans' Fund ; ½*d.* for the Orphanage Fund ; and 1*d.* for the Fund of the Convalescent Home at Holmwood. These contributions were placed by the Grand Council in each separate fund and applied solely for the benefit for which each fund was established.

In August, 1921, at a meeting of the Grand Council at Southampton, it was decided to negotiate for the purchase of "Holmwood," which was then vacant, for the institution

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of a convalescent home there for the use of members of the Order. Fully 90 per cent. of the members of the Order were working men, and in case of sickness had little or no means to enable them to pay for treatment during convalescence. Negotiations were entered into, and as a result the mansion house of "Holmwood" and the grounds belonging to it were bought for 5000*l*. In addition, certain fixtures and fittings of the mansion house were bought for a further 1375*l*. The completion of the purchase of the mansion house and grounds took place on December 27, 1921, and by a deed of conveyance of that date the premises were conveyed to trustees upon trust for the Order. 3000*l*. of the purchase money was allowed to remain on mortgage, and was subsequently paid off by the Order. Further parcels of land were bought by the Order for the convalescent home for 1800*l*., and by a deed of conveyance dated August 31, 1922, these parcels were conveyed to trustees, who, by declaration of trust dated August 31, 1922, covenanted to hold them upon trust for the Order. To enable the Order to find the balance of the purchase money a general appeal was made by the Grand Council to all the members of the Order, and up to June 30, 1923, the sum of 5242*l*. 2*s*. was voluntarily contributed, the donations being for the most part made up of small sums. A considerable amount of money was spent on the home before its opening, and the Grand Council lent to the Holmwood account from time to time various sums to enable the home to be opened and carried on. Up to June 30, 1926, the sums so lent amounted to 4750*l*. The home was furnished with twenty beds to admit twenty patients. There was room for another ten beds as occasion required. The home was opened on August 6, 1923, and patients were immediately admitted and continued to be admitted from that date.

The method by which a member of the Order was admitted into the home was as follows. Application was made by him through his minor lodge to the Grand Lodge for admission, and a medical certificate was submitted. The Grand Lodge formed a local committee, and if the local committee sanctioned

the application it was sent to the general secretary of the Order, who notified the local committee on what date the member could enter the home. After admission, the member was allowed to remain at the home for one month. The local committee paid half his railway fare and the Grand Council paid the other half. No charge or expense was incurred by the member during his residence at the home.

The staff at the home consisted of a matron, who was a trained nurse, a master, four indoor servants, and certain outdoor servants. There were attached to the home two local medical men, who gave their services gratuitously, and a qualified dentist, who also gave his services gratuitously.

The Urban District Council of Redditch treated the home for the purpose of rating as being on a hospital basis, and reduced the assessment from 138*l.* per year to 67*l.* per year.

The Commissioners were of the opinion that the home was not a "hospital" within r. 1 (*c*), and they dismissed the appeal.

The appellants accordingly required them to state this case for the opinion of the Court whether that decision was right.

Latter K.C. and *P. R. J. Barry* (*Laski* with them) for the appellants. The convalescent home maintained by the appellants is a "hospital" within Sch. A, No. VI., r. 1 (*c*), of the Income Tax Act, 1918. When the word "hospital" is used in that Rule it is intended to apply to any institution that is practically of the character of a hospital and is of an eleemosynary character: per Pollock B. in *Cawse* v. *Nottingham Lunatic Hospital Committee* (1), when referring to the corresponding provision (s. 61, r. No. VI.), in the Income Tax Act, 1842. "'Hospital' clearly includes institutions for the relief of physical ailments": per Channell J. in *Mary Clark Home* (*Trustees*) v. *Anderson*. (2) The necessary elements of a "hospital" within the Rule are (*a*) the treatment of sickness, and (*b*) the poverty of the patients. Both are present here. The fact that the crisis of the disease of the patient is over

(1) [1891] 1 Q. B. 585, 589. (2) [1904] 2 K. B. 645, 653.

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before he is admitted to the appellants' home does not render the treatment of convalescence any less the treatment of sickness. In deciding whether or not an institution has a charitable object regard must be had to the purpose for which its income is held and applied: per Rowlatt J. in *Inland Revenue Commissioners* v. *Society for the Relief of Widows and Orphans of Medical Men.* (1) In the present case that purpose is the relief and restoration to complete health of patients who cannot afford to pay for the treatment which they receive, clearly a charitable purpose. *Needham* v. *Bowers* (2) is distinguishable, because there the institution was wholly maintained by payments made by the patients themselves.

Sir Thomas Inskip S.-G. and *R. P. Hills* for the respondent. For an institution to be a "hospital" within the Rule there must be a perpetual foundation and management by a public body: per Fry L.J. in *Blake* v. *Mayor, &c., of London* (3), when referring to "public school" in r. VI. of s. 61 of the Act of 1842: *Cardinal Vaughan Memorial School Trustees* v. *Ryall* (4); *Birkenhead School, Ld.* v. *Dring.* (5) It must also be beneficial to the community: per Lord McLaren in *Maughan* v. *Free Church of Scotland.* (6) There is nothing either perpetual or public about the home maintained by the appellants. There is no charitable endowment to bind it to use as a hospital; it might be closed at any time at the will of the trustees. Moreover, it is conducted purely for the benefit of a limited, although large, community consisting of the members of the Order. It might have been otherwise if the purposes of the Order had been generally charitable. Those objects, however, are not primarily charitable any more than the primary object of the Royal College of Surgeons of Edinburgh is scientific: *Sulley* v. *Royal College of Surgeons, Edinburgh.* (7) The fact that the home is supported by fellow members of the patients does not make it a charitable institution, nor does the fact that it was founded out of a

(1) (1926) 11 Tax Cas. 1, 21.
(2) (1888) 21 Q. B. D. 436.
(3) (1887) 19 Q. B. D. 79, 82.
(4) (1920) 7 Tax Cas. 611.
(5) (1926) 11 Tax Cas. 273.
(6) (1893) 3 Tax Cas. 207, 211.
(7) (1892) 3 Tax Cas. 173.

fund subscribed by benevolent persons: per Charles J. in *Needham* v. *Bowers*. (1)

Latter K.C. replied.

ROWLATT J. The question which I have to consider in this case is whether the convalescent home maintained by the appellants is entitled to exemption from tax on its premises under Sch. A as being a "hospital" within r. 1 (*c*) of No. VI. of that Schedule. The establishment consists of a private house and its grounds, which have been adapted for use as a convalescent home—that is to say, there are received there persons who are no longer in the grip of actual disease but require rest and treatment to restore them to full health and vigour. The Solicitor-General has admitted that, although the institution covers only a small field of hospital work, it is not prevented thereby from being a "hospital" within the Rule, and I have to say whether it has lost the exemption from tax accorded by the Rule by reason of the nature of its support or of the class of persons who are benefited by it.

There is one limitation which, it appears from authority, must be applied to the word "hospital" in r. 1 (*c*), and that is that there must be some eleemosynary element about the maintenance of an institution to constitute it a hospital within the Rule. If, as a whole, it is maintained by the payments of patients, it is not entitled to exemption under the Rule. In the present case the premises constituting the home were bought by subscription inside the Order. The home is supported by the general funds of the Order and the patients at it must be members of the Order. Very few patients—about twenty or thirty—compared with the total membership of the Order can be accommodated in the home.

The Solicitor-General argued that the home was really a private institution owned by the appellants for the benefit of their members, and that, in substance, it possessed no element of public charity in the technical sense of the word "public." On the whole, I do not think that I am justified in holding that the circumstances of the work and management

(1) 21 Q. B. D. 436, 442.

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Rowlatt J.

of this home prevent its obtaining exemption under the Rule. I confess that I approach the matter from the angle that in the Rule there is a perfectly general word—" hospital " —and I must justify excluding this establishment from it. I do not think that, for an institution to fall within the Rule, it must possess a particularly charitable element. It is enough if it has an eleemosynary character in the sense that the patients get its benefits as the result of eleemosynary help by others. The point has also been taken that no trust has been created under which the perpetual user of the premises as a home has been secured. That is true, but, as a practical matter, I fancy that it would be rather difficult, the funds to buy the premises having been obtained by subscription for a definite object, for the appellants to wind up the activities of the home, dispose of the property, and throw the proceeds into their general funds. The home will continue for an indefinite time to be used for hospital purposes.

Am I to regard the matter as if the opportunity of enjoying the amenities of this home was bought by a person who became a member of the Order ? It cannot be said that the enjoyment of those amenities is to be regarded as something in the nature of an insurance benefit which the members of the Order obtain entirely by contract. In my opinion the true position is that the Order is able, by reason of its possession of the premises and sufficient funds, to confer an advantage on a few of its members who suffer from the kind of misfortune that the home has been established to alleviate. The home can be regarded as an eleemosynary establishment maintained by the Order for the benefit of a few of its members out of many. The patients enjoy the amenities of the home by the charity of the Order or of their fellow members. The mere circumstance that the recipients of the benefits of the home are limited to members of the Order makes no difference. An institution is not prevented from being a hospital within the Rule because it has been established for the members of a profession or trade or for some such large section of the community.

For these reasons—although the case is very near the line—I think that the appellants are entitled to succeed with costs.

Appeal allowed.

Solicitors for appellants: *Mawby & Barrie, for Walker & Goldstraw, Stockport.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

G. F. L. B.

WHITE *v.* WHITCHER.

1927

Nov. 24, 28.

Revenue—Income Tax—Relief—Income accumulated under Trust—Payment of Fund to Beneficiary twenty Years after Date of Death of Testatrix—Whether Benefit contingent on "attaining some specified age"—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 25.

A testatrix by her will directed stock to be held on trust and the income of it to be invested to accumulate at compound interest, the trustees to stand possessed of the accumulated fund upon trust after the expiration of twenty years from the date of her death to pay the same to the issue of a certain marriage of which the respondent was the only child:—

Held, that the fund had not been accumulated for the benefit of the respondent "contingently on his attaining some specified age" within s. 25 of the Income Tax Act, 1918, so as to entitle him to repayment of a sum in relief of tax under that section.

CASE stated by General Commissioners of Income Tax.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the division of Brighton held at Brighton on January 13, 1927, the respondent, Edgar Balland Laurence Cuff Greenhill Whitcher, of 58 Lansdowne Place, Hove, appealed against an objection laid by the appellant (an inspector of taxes for the Brighton second district) to a claim made by the respondent under s. 25 of the Income Tax Act, 1918. (1)

(1) Sect. 25 of the Income Tax Act, 1918, provides: "Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment of that income and the income from any other fund subject to the like trusts for accumulation and of the total income of that person from all sources (hereinafter

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The following facts were found or admitted :—By her will dated May 24, 1904, the Baroness Ublagger directed her executors to transfer to the Trustees Executors and Securities Corporation 4659*l*. Milford Docks " A " debenture stock to be held upon trust to invest the income thereof and to accumulate the income of the investments so made in the way of compound interest by from time to time similarly investing such income and the resulting income of investments and directed that the trustees should stand possessed of the said debenture stock and the accumulated fund arising from the income thereof upon trust after the expiration of twenty years from the date of her death to transfer or pay the same to the children the sum equally divided of Ethel and Charles Edgar Whitcher and, if there should be only one such child, then the whole to such child. The respondent was the only child of Ethel and Charles Edgar Whitcher and was born on January 11, 1901. The Baroness Ublagger died on November 2, 1905. The respondent received the legacy on November 2, 1925, and he claimed repayment of tax for the period of twenty years to April 5, 1925, under s. 25 of the Income Tax Act, 1918.

The Commissioners decided that the period of twenty years mentioned in the will of the testatrix constituted a direction to accumulate for the benefit of the appellant " contingently on his attaining some specified age " within s. 25, and that the appellant was therefore entitled to the payment for which he asked.

The appellant, being dissatisfied with the decision of the Commissioners as being erroneous in point of law, required

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referred to as 'the aggregate yearly income') is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax, that person shall, on making a claim for the purpose within three years after the end of the year of assessment in which the contingency happens, be entitled . . . . to have repaid to him on account of the tax which has been paid in respect of the income during the period of accumulation a sum equal to the aggregate amount of relief to which he would have been entitled if his total income from all sources for each of the several years of the said period had been equal to the aggregate yearly income for that year. . . . ."

them to state a case for the opinion of the High Court of Justice.

Sir Thomas Inskip S.-G. and *R. P. Hills* for the appellant. "Specified age" in s. 25 of the Income Tax Act, 1918, means an age which is definitely expressed in the instrument directing the accumulation by a specific number of years and not an age which can only be ascertained by calculation with reference to some extrinsic matter. In both *Stoneley* v. *Ambrose* (1) and *Dale* v. *Mitcalfe* (2) the "specified age" satisfied the conditions contended for here. On the other hand, in *Inland Revenue Commissioners* v. *Bone* (3) it was held that, where the division of an accumulated fund depended on the death of a mother and the attainment of majority by her youngest surviving child, there was no contingency to which s. 25 applied. The present respondent became entitled to the fund not because he had attained an age specified in the will, but because a certain period stipulated by the testatrix had elapsed.

Neve for the respondent. "Specified age" does not necessarily mean an age specified by a numerical figure. Sect. 25 is satisfied if, as here, the age at which the contingency is to occur is clearly determinable. Immediately on the death of the testatrix, until which the will was not operative, the respondent's exact age at the moment when he would become entitled would be apparent. In *Attorney-General* v. *Marquis of Hertford* (4) it was held that "specific sum" in s. 4 of the Legacy Duty Act, 1805 (45 Geo. 3, c. 28), applied not only to charges of sums certain, the precise amount of which was ascertained by the deed of settlement, but also to any sum which could be accurately computed by reference to matters outside the deed. In *Elliott* v. *Duchess Mill, Ld.* (5) Scrutton L.J. said that "specific" meant the same as "specified." An event remains specific or specified so

(1) (1925) 9 Tax Cas. 389.
(2) [1927] 2 K. B. 491.
(3) (1927) Tax Cas. Leaflet No. 321.
(4) (1845) 14 L. J. (Ex.) 266.
(5) [1927] 1 K. B. 182, 204.

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long as it retains a definite position in relation to a fixed point.

The Solicitor-General replied.

Cur. adv. vult.

Nov. 28. ROWLATT J. read the following judgment: In this case a fund was by will directed to be accumulated for twenty years from the death of the testatrix when it was to be divided among the then living children of a certain marriage. There was one such child living at the date of the will and no more were ever born, although the parents survived the testatrix. The twenty years having expired, the above mentioned child became entitled to the whole fund and the question is whether, within the meaning of s. 25 of the Income Tax Act, 1918, it was accumulated for his benefit "contingently on his attaining some specified age or marrying."

It may be a question whether, accurately read, the statute does not apply only to cases where there are these alternative contingencies, so that the respondent here, whose interest would not vest on marriage, is outside it on that ground. The common trust is for issue who, being sons, attain twenty-one years or, being daughters, attain that age or marry. If the statute only applies to the daughters in such cases such a result is very remarkable. I express no opinion on this point, although I have thought it best to mention it.

In my view, the words "attaining some specified age" are not satisfied in the present case. I think that they mean living to a point of time defined by reference to the then age of the person and not to a point of time fixed by reference to other occurrences, although, of course, when the necessary data are ascertained, it will be known how old any given person will be at a given date. Age under the statute is of the essence. In connection with the gift in the present case it is, as such, immaterial. The appeal must be allowed, with costs.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Cockburn, Gostling & Co., Hove.*

G. F. L. B.

FRANCE *v.* J. COOMBES AND COMPANY.

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Nov. 30;
Dec. 1.

Master and Servant—Wages—Minimum Wage—Trade Board—Worker employed on Work of specified Trade and also on other Work—Presence on Employers' Premises during all working Time—Calculation of Wages—Trade Boards Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 32), *s.* 8.

By the Trade Boards (Boot and Shoe Repairing) Order, 1919 (St. R. & O., 1919, No. 543), made by the Minister of Labour, the Trade Boards Acts were applied to the boot and shoe repairing trade, and in due course the trade board established for the trade fixed minimum rates of wages for managers and other classes of workers in the trade.

The plaintiff was engaged as manager of a branch shop owned by the defendants for the primary purpose of repairing boots and shoes. During about half the time during which he was present at the shop he was engaged actually in repairing boots and shoes. During the remaining business hours he kept the books and accounts, sold goods by retail, had his meals and cleaned the shop and its fittings:—

Held, that, in calculating the amount of the wages payable to the plaintiff, he was not to be deemed to have been employed in boot and shoe repairing "during all the time during which he was present" at the defendants' shop within s. 8 of the Trade Boards Act, 1918, because during part of that time he was "so present for some purpose unconnected with his work and other than that of waiting for work to be given to him to perform."

ACTION tried by MacKinnon J. without a jury.

By an agreement in writing dated January 3, 1923, the plaintiff, a boot and shoe repairer, agreed to serve the defendants, a firm of boot and shoe repairers, as working manager of their branch shop at Openshaw, Manchester. Under that agreement he undertook to do (*a*) all kinds of boot repairing and other work required by the defendants and to devote the whole of his time, ability and attention to the defendants' business; . . . . (*c*) to be responsible for all moneys and goods of the defendants at the branch at which he was employed . . . .; (*d*) to render to the defendants all accounts as required; (*e*) to account for and pay over all moneys of the defendants as instructed or required; . . . . (*g*) to keep all business books and documents on the premises at which he was employed; (*h*) to keep open the branch shop and remain in attendance thereat during business hours; . . . . (*j*) not to sell leather, rivets, patching or other goods which were used in the repairing business of the defendants,

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but to sell only those goods which were known as "sundries" according to the list appearing in the "sundries order book." The agreement also provided for the payment by the defendants to the plaintiff of a wage of 2*l.* 18*s.* a week and certain bonuses. The service was terminable by seven days' notice given by either party to the agreement. During the currency of the agreement the defendants paid to the plaintiff the amount due to him under its terms.

By a document headed "Rules for Branch Managers," which was signed by the parties, it was provided that the business hours of the shop were to be from 8 A.M. to 7.30 P.M., except on Fridays, when they were to be from 8 A.M. to 8 P.M., and on Saturdays, when they were to be from 8 A.M. to 1 P.M. Meal times were to be from 12.30 to 1.30 P.M. and from 4.30 to 5 P.M. "Sundries" were not to be sold during meal times. The shop must be swept and the windows dusted and set out every morning before 10 o'clock and the windows washed inside and outside on Tuesdays and Fridays. Linoleum must be washed and the brass polished every Friday, and the shop floor, fittings, signs, etc., washed as often as required. All goods received must be checked immediately. Cash and tickets [for repairs] must be balanced and the day book entered up nightly. Cash must be kept in a safety till. Every week a balance sheet must be completed and a stock and sundries sheet made out.

By the Trade Boards (Boot and Shoe Repairing) Order, 1919 (St. R. & O., 1919, No. 543), made by the Minister of Labour under the Trade Boards Acts, 1909 and 1918, those Acts were applied to "the boot and shoe repairing trade, that is to say, the repairing wherever carried on of boots, shoes, slippers and all kinds of leather footwear including the making of bespoke handsewn, riveted or pegged leather footwear, but excluding the manufacture of leather footwear on a large scale, the repairing of saddlery and leather goods other than leather footwear and the retailing of leather footwear." The trade board established for the trade in due course fixed minimum piece-rates and time-rates for the industry, which rates were confirmed by the Minister.

A "manager" was defined by the trade board as "a worker who is employed in any branch of the trade specified in the Trade Boards (Boot and Shoe Repairing) Order, 1919, and . . . . (*b*) who (whether working alone or with any other worker), under the terms of his employment, in addition to any work which may be required of him as a journeyman, fits up or supervises the fitting up of the work, and has control of the repairing or making and technical direction thereof."

The general minimum time-rate fixed by the trade board for managers was 80*s*. per week of 48 hours, and was "subject to a proportionate reduction according as the number of hours of employment in any week is less than 48." For hours worked over 48 in a week there were overtime rates at time and a quarter and time and a half.

The plaintiff remained in the defendants' employment under the contract contained in the documents referred to for three years. After he left it he brought this action claiming 363*l*. 10*s*. 6*d*., balance of wages due to him under the Trade Boards Acts on the ground that he was entitled to be paid the applicable minimum wage in respect of all the time during which he was present at the defendants' shop. The defendants denied liability, and said that they had paid to the plaintiff the full wages due to him under the agreement of January 3, 1923, and that he was estopped from contending that he was entitled to any further sum.

The judge found as facts that the primary purpose of the defendants' shop was to repair boots and shoes, but that there was also a retail business of selling "sundries," i.e., not ready-made boots and shoes, but blacking, laces and goods of that character. The plaintiff spent about half the time during which he was present at the shop in actually repairing boots and shoes, and during the other half he was engaged in selling "sundries," cleaning the shop and fittings, keeping the books and accounts, and performing other duties specified in his contract. During meal times he would take refreshment not without interruption by customers bringing in or calling for boots and shoes. Every night he rendered an account of the number of hours which he had worked

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during the day at actual boot and shoe repairing. In the weekly balance-sheet there was shown "manager's earnings," which indicated the amount of piece-work earnings for repairing boots and shoes earned by the plaintiff during the week. These were based on the piece-work rates fixed under the Trade Boards Acts, 1909 and 1918, and were paid to the plaintiff by the defendants.

Schiller K.C. and *Hilbery* for the plaintiff. The plaintiff is entitled to succeed. The contract between him and the defendants is void if and in so far as it provides for the payment of wages on a scale in contravention of that fixed by the trade board: Trade Boards Act, 1909, s. 6, sub-s. 5. The plaintiff relies on s. 8 of the Trade Boards Act, 1918. (1) By that section he must be deemed to have been employed at the minimum rate of wages during all the time during which he was present on the premises of the defendants, unless they prove that "he was so present for some purpose unconnected with his work and other than that of waiting for work to be given to him to perform." While he was not actually employed on repairing boots and shoes he was receiving them for repair or returning them to customers, preparing the shop for repairing work and the reception of customers and keeping accounts in connection with the business. That cannot be said to be a "purpose unconnected with his work" as a boot and shoe repairer. He might properly be said to be "waiting for work to be given to him to perform." A craftsman in a certain trade is no

(1) Sect. 8 of the Trade Boards Act, 1918: "For the purpose of calculating the amount of the wages payable in the case of a worker employed on any work for which a minimum rate of wages has been fixed under the principal Act [i.e., the Trade Boards Act, 1909], the worker shall be deemed to have been employed during all the time during which he was present on the premises of the employer, unless the employer proves . . . . that he was so present for some purpose unconnected with his work and other than that of waiting for work to be given to him to perform, and in the case of a worker employed on piece-work shall be deemed during any time during which he was so present and was not doing piece-work to have been employed at the general minimum time-rate applicable to workers of the class to which he belongs. . . . ."

less a craftsman because he performs certain minor duties for his employer outside his craft.

Bevan K.C. and *Sir Robert Aske* for the defendants. Admittedly the contract between the parties is void if the plaintiff is right in his claim to be paid minimum wages during all the business hours of the shop. But it is not true to say that he must be "deemed to have been employed during all the time during which he was present on the premises" of the defendants. The question is during what time he was acting as an actual boot and shoe repairer, not during what time he was a member of the boot and shoe repairing trade. He was only actually engaged in repairing boots and shoes during about half the time during which he was present at the shop and he was paid the minimum rate of wages in respect of that time. During the remaining business hours he was at the shop "for some purpose unconnected with" boot and shoe repairing "and other than that of waiting for work to be given to him to perform" within s. 8.

Schiller K.C. replied.

MACKINNON J. The question which I have to decide is whether the plaintiff can say that he was employed in the trade of boot and shoe repairing during the whole time during which he was present in the defendants' shop, or whether the defendants can say that he was only so employed during that part of the day in which he was actually repairing boots and shoes.

If a man is employed partly in repairing boots and shoes in a small shop like that in the present case and partly in selling articles by retail, partly in keeping the shop in order, and partly in making up the accounts, I should have thought that he was employed in various tasks and that only part of his time was actually occupied in repairing boots and shoes. But I have to take into account s. 8 of the Trade Boards Act, 1918. It is obvious that the plaintiff was present on the defendants' premises for more than 60 hours each week. He is, therefore, to be "deemed to have been employed" on

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the work of boot and shoe repairing during all that time, "unless the employer proves . . . . that he was so present for some purpose unconnected with his work" of boot and shoe repairing "and other than that of waiting for work to be given to him to perform." Several questions arise on the section. Do the words in it "his work" mean in this case the plaintiff's work of boot and shoe repairing, or his work for the defendants whatever it might be. Having regard to the whole purpose of these Acts, I think that "his work" means here "his work of boot and shoe repairing," and, in my opinion, the defendants have shown that the plaintiff was present at their shop for some purpose unconnected with the work of boot and shoe repairing, because he was only repairing boots and shoes during about one-half of the business hours and during the rest of that time he was cleaning the shop, selling "sundries," making up the books, eating his meals, and, possibly, during a considerable number of hours, doing nothing at all.

But the defendants, to succeed, have to do something more. They have also to show that the plaintiff was present "for some purpose . . . . other than that of waiting for work to be given to him to perform." Can the defendants say that the plaintiff, when not repairing boots and shoes, was in the shop for some purpose other than that of waiting for work to be given to him to perform? He was undoubtedly waiting there for work to be given to him to perform in the sense that if, while he was either doing nothing or was performing some of his other duties, a customer came in with a pair of boots or shoes for repair, he would be given work to perform. In my opinion, however, the section contemplates the case of a time-worker who is definitely employed during the whole of his time to do work for which minimum rates of wages have been fixed. If, through no fault of his, but owing to the delay of some fellow-worker employed in bringing him the raw material, or owing to the absence of raw material on which he can work, or for any other cause that is not by his fault, he is unable to work for a given period he is not to be prejudiced in his right to payment in respect of that

period. I think that the defendants here can say that the plaintiff was at their shop for a purpose other than that of waiting for work to be given to him to perform, that purpose being to look after the shop and so on. Doubtless it is true that the main purpose of the business and of his employment was the repairing of boots and shoes, but other things were involved in his employment. He was employed, not only as manager in the sense of the definition of "manager" by the trade board, but also as the manager of all the business carried on at the shop, in which capacity he had to do a number of things.

Taking a more general view of this legislation and these Orders, I do not think that their purpose was to entitle a man who has become a member of a privileged class for which minimum rates of wages have been fixed under the Trade Boards Acts to be paid the minimum rate applicable to him whatever may be the work on which he is employed. Their whole purpose is to ensure that any man, during the time that he is doing work for which minimum rates of wages have been fixed, is paid the minimum rate applicable to him. It is necessary to take that view if one considers the case of a man in an ordinary boot shop, part of whose time is spent in repairing leather footwear and the rest of whose time is spent in retailing boots and shoes, for the definition in the Trade Boards (Boot and Shoe Repairing) Order, 1919, of "the boot and shoe repairing trade" is "the repairing . . . . of boots, shoes, etc. . . . . but excluding . . . . the retailing of leather footwear." In my view, therefore, s. 8 is not decisive of this case in favour of the plaintiff. The defendants have proved that during about half the time he was present at the shop he was "so present for some purpose unconnected with his work" of boot and shoe repairing "and other than that of waiting for work to be given to him to perform." During the time he was actually repairing boots and shoes he was paid the proper minimum rate and, therefore, his claim fails.

Had I decided otherwise I should have held that the meal times enjoyed by the plaintiff must be deducted from

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the total number of hours a week during which he was present at the defendants' shop, because proviso (*b*) in s. 8 enacts that "a worker while present during normal meal times in a room or place in which no work is being done shall be deemed to be present for a purpose unconnected with his work." It is, however, unnecessary to discuss that.

The claim fails, and there must be judgment for the defendants, with costs.

Judgment for the defendants.

Solicitors for plaintiff: *Church, Adams & Co., for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for defendants: *T. D. Jones & Co., for Topham & Phillips, Harrogate.*

G. F. L. B.

1927

Nov. 10, 11.

In re F. AND E. STANTON, LIMITED.

Company—Winding Up—County Court—Jurisdiction—Debenture—Fraudulent Preference—Floating Charge—Motion to set aside—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 131, 210, 212.

By s. 131, sub-s. 6, of the Companies (Consolidation) Act, 1908: "Every Court in England having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court." . . . . The effect of this sub-section is to clothe the inferior courts referred to in s. 131, sub-s. 1, with all powers necessary to decide matters of administration and disputes which have arisen in the course of and in consequence of the winding up.

Thus the county court, which is engaged in winding up a company in virtue of s. 131, sub-s. 3, has jurisdiction to hear a motion by the liquidator to set aside debentures issued by the company, alleging that they constitute a fraudulent preference within s. 210 or a floating charge created within three months of the winding up contrary to s. 212 of the Act.

APPEAL from Greenwich County Court.

The company was incorporated on April 3, 1922, with a nominal capital of 5000*l.*, divided into 1*l.* shares, of which 3337 shares were issued. The main object of the company according to the memorandum of association was the carrying

on of the business of drawers of gold, silver, copper and other metal wire, and it had carried on this business at Lewisham in the county of Kent since its incorporation.

On January 20, 1926, at a meeting of directors of the company, debentures amounting in the aggregate to 4500*l.* were created in favour of Edwin Maule and Albert Harris, in consideration of moneys previously advanced by them to the company, and particulars of this issue were filed with the registrar on January 21, 1926. Each debenture was for 500*l.* and was one of a series of thirty debentures being expressed to rank pari passu as a first charge on the company's property and to be by way of floating security.

On February 4, 1926, the above two debenture holders purported to appoint a receiver of the assets of the company under powers contained in their instruments of charge.

On January 25, 1926, a petition was presented to the county court at Greenwich for the winding up of the company, and a winding-up order was made thereon on February 19, 1926, at the Greenwich County Court.

On May 18, 1927, the liquidator applied by motion to the Greenwich County Court, for a declaration that the above debentures were invalid under the Companies (Consolidation) Act, 1908, s. 212, as being a floating charge created within three months before the commencement of the winding up, or alternatively as being a fraudulent preference within s. 210, sub-ss. 1 and 2, of the same Act, and that Messrs. Maule and Harris had no further rights in the 4500*l.* except as unsecured creditors in the winding up.

The liquidator also asked for an order that the debenture holders and the receiver should hand over to him all property and moneys of the company, including 2700*l.* already paid over by the receiver to the debenture holders and the 1349*l.* now in the hands of the receiver, and for an account.

At the hearing, objection was taken to the motion on behalf of the debenture holders on the ground that the county court had no jurisdiction to hear the application.

The deputy county court judge overruled the objection, but gave leave to appeal.

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The grounds of appeal were that the deputy county court judge was wrong in law in holding that he had jurisdiction in the matter, that the issues could not be tried on motion or other summary process, and that in any case the county court ought not to exercise jurisdiction in this matter.

Clayton K.C. and *Arthur Mulligan* for the debenture holders. The county court had no jurisdiction to make this order on a matter between the company and debenture holders, nor can it be raised at all on motion.

The object of s. 131, sub-ss. 1, 3, and 6, is only to define which Court is to have control of the winding up. (1) It is not intended thereby to give jurisdiction to the county court or other inferior court to decide questions of fraudulent preference in transactions as between the company and its creditors. In *Ex parte Brown, In re Yates* (2) the Court of Appeal held that where, in bankruptcy, a transaction was impeached as a fraudulent preference, the Court of Bankruptcy ought to decide the matter itself. In bankruptcy a county court judge has jurisdiction where the amount in dispute does not exceed 200*l.* (Bankruptcy Act, 1914, s. 105), but there is no such provision in the Companies (Consolidation) Act, 1908. In *In re Ilkley Hotel Co.* (3) under the Companies (Winding Up) Act, 1890, s. 1, which corresponds to s. 131 of the present Act, it was held that the county court had no jurisdiction to make an order on a question of title to property which arose before the commencement of the winding up. Cave J. there said: "The functions of the

(1) The Companies (Consolidation) Act, 1908, s. 131, sub-s. 1: "The Courts having jurisdiction to wind up companies registered in England shall be the High Court, the Chancery Courts of the Counties Palatine of Lancaster and Durham, and the county courts."

Sub-s. 3: "Where the amount of the share capital of a company paid up or credited as paid up does not exceed ten thousand pounds, and the registered office of the company is situate within the jurisdiction of a county court having jurisdiction under this Act, a petition to wind up the company shall be presented to that county court."

Sub-s. 6: "Every court in England having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court."

(2) (1879) 11 Ch. D. 148.

(3) [1893] 1 Q. B. 248, 250.

Court are administrative; and there is no ground for collecting from the language of the Acts an implied power to decide such a question as this." If such jurisdiction lay with the county court that court would have power to make an order without any limit as to amount and without appeal. In *In re Centrifugal Butter Co.* (1) Neville J. was doubtful whether the High Court had jurisdiction upon a summons in a voluntary liquidation under s. 193 to set aside a contract between the company and its vendor, and if there was such jurisdiction he refused to exercise it.

[They referred also to *In re New Par Consols.* (2)]

Vaisey K.C. and *Oscar Kean* for the liquidator. The county court has here the necessary jurisdiction by virtue of s. 131, sub-s. 6. The ascertainment of the validity of debentures is an essential part of proceedings in the winding up, without which the proceedings would be imperfect. When Cave J. in *In re Ilkley Hotel Co.* (3) said that the functions of the Court were "administrative," he did not mean "non-controversial," but that they must be within the four corners of the winding up. In *Ex parte Brown, In re Yates* (4) James L.J. said: "Questions of fraudulent preference and acts of bankruptcy are the very things which were intended to be dealt with by the Court of Bankruptcy." We rely on that passage. Those transactions could only have been impeached in the bankruptcy, just as here these questions of fraudulent preference and debentures issued on the eve of winding up can be properly dealt with only by a winding-up Court and not by ordinary tribunals. The Bankruptcy Act, 1914, s. 105, differs in that it gives to the county court power to adjudicate on matters which do not arise out of the bankruptcy, subject to the limit of 200*l.* The Companies Acts give no such express jurisdiction, but these are matters which do arise in connection with the winding up.

The *Ilkley Hotel Co.'s* case (3) is no authority for saying that the county court has no jurisdiction in matters which arise in the course of the winding up. All that Neville J.

(1) [1913] 1 Ch. 188.
(2) [1898] 1 Q. B. 573; [1898] 1 Q. B. 669.
(3) [1893] 1 Q. B. 248.
(4) (1879) 11 Ch. D. 148.

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decided in *In re Centrifugal Butter Co.* (1) was that if he had jurisdiction to hear the summons he ought not in his discretion to exercise it. In *In re Columbian Fireproofing Co.* (2) proceedings as to the validity of debentures under s. 212 were commenced by summons.

Finally, the liquidator is an officer of the Court, and if independent proceedings were taken, difficulties would arise which are not present if the question is heard by the Court which is in actual control of the winding up.

[They also referred to Companies (Winding Up) Rules. 1909, r. 11, and Form 3.]

Clayton K.C. in reply. There is no jurisdiction to deal with matters between the company and third parties by summons or on motion: *In re Centrifugal Butter Co.* (1) There is power under s. 215 to assess damages against directors for misfeasance on the application of the liquidator in the winding up, but no such proceedings are available for the setting aside of debentures as in the present case: Buckley on Companies, 10th ed., pp. 449, 503.

The ordinary powers of the Court in a winding up are contained in ss. 163–173 of the Act of 1908. No such power as is here invoked appears in those sections, and it follows that no such power is reposed either in the High Court or in the county court to deal with questions of fraudulent preference upon motion.

AVORY J. This company was, at the time of the hearing of this motion, in course of being wound up in the county court at Greenwich. There is no dispute that the winding up was within the jurisdiction of that court, being within s. 131, sub-ss. 2 and 3, of the Act of 1908. That being so s. 131, sub-s. 6, provides that "every Court in England having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court. . . . ." Objection was taken on behalf of the debenture holders that the county court judge had no jurisdiction to hear an application as to the validity of the debentures under

(1) [1913] 1 Ch. 188. (2) [1910] 1 Ch. 758.

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ss. 210 and 212. The judge overruled the objection, and it is upon this point that this appeal comes for decision.

It was argued for the debenture holders that even if the county court judge had jurisdiction he ought not to exercise it in the present case. I do not follow that. If the county court judge had jurisdiction and were to say that it was a matter for his discretion and were to refuse to exercise it the liquidator could come to this Court and ask for a mandamus to compel him to do so. To such an application there would be no answer.

The only question therefore is whether the county court judge had jurisdiction to deal with the motion. The motion was based on ss. 210 and 212 of the Companies (Consolidation) Act, 1908. [His Lordship read those sections and continued :] It is true that neither of those sections confers any express power either on the High Court or on the county court. One must deduce from them that certain acts by the company are rendered invalid in law, and it is equally true that these are matters which arise only in the winding up and can only there be dealt with. In view of s. 131, sub-s. 6, it would appear that if the High Court has the power or jurisdiction to deal with such a motion as this, then by virtue of that section the county court, when it is winding up a company, has a similar jurisdiction. We are invited, on the strength of two decisions—*In re Centrifugal Butter Co.* (1) and *In re Ilkley Hotel Co.* (2)—to say either that the High Court has no such jurisdiction, or that if it has, then on the authority of *In re Centrifugal Butter Co.* (1) the Court ought not to exercise it. I was at first inclined to agree that the *Ilkley Hotel Co.'s* case (2) did amount to a decision in favour of the appellants on the grounds that if the respondent were right the county court judge would be assuming jurisdiction to make orders without any limit as to the amount and in many cases without appeal. But on a closer examination of the decision, and of the material sections of the Act, I think that the *Ilkley Hotel Co.'s* case (2) does not govern this point. The report does not state exactly how the question arose between the parties. But in whatever

(1) [1913] 1 Ch. 188, 190. (2) [1893] 1 Q. B. 248.

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way it arose there was no decision by the Court upon any question of fraudulent preference or floating charge. Cave J. declined to express an opinion whether the county court judge in that case had jurisdiction to declare the transaction a fraudulent preference. In other words the decision does not say that in a matter which arises and can only arise in the course of the winding up and ought to be dealt with by that tribunal the county court has no jurisdiction. The judgment is founded largely upon the express provision of the Bankruptcy Act then in force limiting the powers given to the county court to cases where the amount in dispute did not exceed 200*l.*, and to the fact that there was no similar provision in the Companies Act then in force. The absence of such provision does not in my view take away the jurisdiction of the county court expressly conferred by s. 131, sub-s. 6. *In re Centrifugal Butter Co.* (1) arose under s. 193 of the Act of 1908, as to the jurisdiction of the Court to set aside a contract on a summons under that section, and Neville J. decided that if it had such jurisdiction it was discretionary only. Neville J. observed that s. 193 gave the Court the same powers in a voluntary as in a compulsory winding up. In his judgment he said: "I am not sure whether it is a question of jurisdiction or only one of discretion. I cannot in this case make any distinction between a contract with directors or a contract with other persons, because the original contract was clearly in order having regard to the constitution of the company. I cannot find the directors guilty of misfeasance until the contract is set aside, and I am doubtful if I have jurisdiction to set aside the contract on this summons. In the *Oakwell Collieries* case (2), which was relied on, the application was for delivery up to the company of possession of an estate to which they were prima facie entitled; that is quite a different case from the one before me. But if I have jurisdiction I am clearly of opinion that I ought not to exercise it. Before coming here for relief the applicants must bring an action for rescission of contract and succeed in it." That decides that in the present case

(1) [1913] 1 Ch. 188, 190. (2) [1879] W. N. 65.

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the county court judge might say, as Neville J. there said: "This is a matter on which there is so much dispute of fact that I ought not to determine it upon affidavit but leave the parties to bring an action." I cannot hold that this decision compels the county court judge to follow the same course as was there taken by Neville J., nor does it seem to me to be an authority in support of the proposition that the county court judge had no jurisdiction.

Reference has been made to the rules and forms laid down by learned judges having charge of the winding up of companies for the convenience of the Court in dealing with disputed questions of fact. So far as I know, it is open to the county court to lay down rules for their own guidance in such matters. If not, there might be ground for an application to remove the present case from the county court to the High Court. But we are here simply to determine the question of jurisdiction and I think that the county court judge had jurisdiction to deal with the motion. That being so I make no order as to its removal into the High Court, but only hold for the reasons which I have given that the present appeal be dismissed.

SALTER J. I am of the same opinion. The county court has jurisdiction under s. 131, sub-ss. 1 and 3, of the Act of 1908 to wind up this company, and by sub-s. 6: "Every Court in England having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court." We have to construe those words and especially the words "for the purposes of that jurisdiction." The construction of this sub-section seems to be almost free from authority, and we must therefore construe it first as it stands and then refer to such authorities as are of any assistance. The section confers very wide powers on the county court in the matter of winding up a particular company. That court is to have all the powers of the High Court for the purposes of that (namely, winding up) jurisdiction. That means that the inferior court is clothed with all necessary powers of the High Court to wind up a particular company, which are necessary for the purpose of

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winding up that company. Those would be powers to decide matters of administration and disputes arising in and in consequence of the winding up, which have arisen because the company is being wound up and must be decided before the winding up is completed.

Here the county court judge was invited by the liquidator on motion to decide this dispute between himself and persons outside the company. Debentures issued by the company were said to be a fraudulent preference of a creditor, and alternatively were said to be a floating charge created within three months of the winding up of the company in violation of s. 212 of the Act of 1908. The question to be decided is whether the determination of these matters is necessary "for the purposes of the winding up."

I think that it was necessary for this purpose, and apart from authority, that the county court judge was right. On behalf of the debenture holders we were referred to *In re New Par Consols* (*No.* 1) (1), in which the Divisional Court had to construe words identical with the words now in question. That was a case where the county court judge had acted under an express power, and the observations of Lord Russell C.J. are of no assistance here.

In *In re New Par Consols* (*No.* 2) (2), which came before the Court of Appeal, the question was one of prohibition. The county court judge had made a committal for disobedience to his order, and the Court of Appeal held that the county court judge was for the purposes of the winding up a court of co-ordinate jurisdiction, and therefore that prohibition could not be granted. The words now in question were considered by A. L. Smith and Chitty L.JJ. A. L. Smith L.J. said: "By that enactment the county court judge is, for the purposes of winding up companies, invested with all the powers possessed by the High Court in relation to the winding up." Chitty L.J. said: "In this case the county court judge had jurisdiction to wind up the company in question under the Companies (Winding Up) Act, 1890, and the effect of s. 1, sub-s. 6, of that Act is that he has

(1) [1898] 1 Q. B. 573. (2) [1898] 1 Q. B. 669.

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conferred on him for the purposes of such a winding up, all the powers of the High Court." Chitty L.J. therefore keeps more closely to the actual words of the sub-section than A. L. Smith L.J., but I do not think those judgments throw any light on the question whether fraudulent preference and floating charge are matters in which the county court judge has the powers of the High Court on matters necessary for decision for the purposes of winding-up jurisdiction.

Both sides have availed themselves of the analogy of bankruptcy, and reference has been made to *Ex parte Brown. In re Yates.* (1) [His Lordship read the headnote in the Law Reports and continued :] James L.J. said in the course of his judgment: "This point is really not arguable. Questions of fraudulent preference and acts of bankruptcy are the very things which were intended to be dealt with by the Court of Bankruptcy." So far as any help can be derived from the analogy of bankruptcy, this case assists the respondents rather than the appellants.

In both matters submitted to the county court judge, the liquidator was seeking to enforce his rights which existed only by reason of the winding up. We were referred to *In re Ilkley Hotel Co.* (2) There the county court judge, upon a question of fraudulent preference, held that no such preference was given; but he ordered that certain property transferred by the manager of the company to particular persons should be restored, on the ground that the manager had no authority from the company. The company would have been entitled to recover the property even if there had been no winding up, and upon appeal it was held that the county court had no jurisdiction in the matter. Cave J. expressly left open the matter which we are here considering. There is nothing in that judgment inconsistent with the view we are now expressing. The Court there decided a matter between a company and other persons which had nothing to do with a winding up.

In re Centrifugal Butter Co. (3) was an application by summons under s. 193 of the Act of 1908 to set aside an

(1) 11 Ch. D. 148, 149. (2) [1893] 1 Q. B. 208.
(3) [1913] 1 Ch. 188.

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agreement between the company and third parties, and the question was whether the Court ought to allow s. 193 to be used for that purpose. There again the decision is in no way inconsistent with our view in the present case. We have been referred on behalf of the appellants to Buckley on Companies, 10th ed., pp. 439, 504. We are not concerned with those sections, but I do not think that the observations there made are in conflict with our view. We were also referred to ss. 163 to 173 of the Companies (Consolidation) Act, 1908. These sections set out a series of powers for the purpose of winding up, and it was argued that because express powers are there given, neither the county court nor the High Court has power to deal with questions of fraudulent preference or floating charge by motion in the winding up. It was admitted that it is often the practice of the High Court to do so, and it was essential to the argument that if the point were taken it must be decided that the High Court has no power. We ought not to accede to an argument which is based upon what is inconsistent with ordinary practice. For these reasons, I am satisfied that the county court judge has jurisdiction to deal with this matter. It was said that even if he had jurisdiction he ought not to have exercised it, in view of the large sum involved and the inadequacy of the county court procedure. If the county court deals with it at all it must be on motion. These arguments might support an application to transfer the matter to the High Court, but such a transfer cannot be ordered on this appeal. This point has already been dealt with by Avory J., and I concur with his judgment on it. As to the question whether the county court judge ought to have exercised his jurisdiction, the difficulty is that if the matter was within his jurisdiction he had the right to deal with it, and as he has in fact done so we cannot interfere.

For these reasons I agree that the appeal fails.

Appeal dismissed.

Solicitors for debenture holders: *Leader, Plunkett & Leader.*

Solicitors for liquidator: *Dalston, Sons & Elliman.*

F. P. F.

H. J. GREEN (Inspector of Taxes) *v.* J. GLIKSTEN AND SON, LIMITED.

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Dec. 6, 7.

Revenue—Income Tax—Insurance against Fire—Loss of Stock in Trade by Fire—Insurance Moneys—Inclusion in Profit and Loss Account as a Trading Receipt—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

A quantity of timber belonging to a company carrying on business as timber merchants was destroyed by fire. In the company's accounts the stock in trade was valued at cost price less large sums which had been written off for depreciation, and the reduced sums so arrived at were adopted each year in order to arrive at the company's profits for income tax purposes. The company kept its stock in trade insured against loss or damage by fire. For the purpose of fire insurance, however, the stock in trade was valued at replacement value. At the date of the fire the value of the stock in trade destroyed was very high, and the company claimed from, and was paid by, the insurance companies in respect of the replacement value of the stock destroyed the sum of 477,000*l.* Of that amount the sum of 160,000*l.*, estimated by the company to be the written down value of the timber destroyed, was brought into the company's accounts as a trading receipt, and the balance (after deducting one or two items), amounting to 313,000*l.*, was carried into the balance-sheet as a reserve, but was not brought into the profit and loss account. The Crown claimed that the whole of the money received from the insurance companies in respect of the destroyed timber constituted a trading receipt and should have been brought into the company's profit and loss account for the year in question:—

Held, that the company must bring the whole of the money they had received from the insurance companies in respect of the timber destroyed by fire into their profit and loss account as a trading receipt in the same way as they would have had to account for the timber which had been destroyed.

Case stated under s. 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court.

At meetings of the Commissioners held on June 25, 1924, and April 6, 1925, for the purpose of hearing appeals the respondents, J. Gliksten & Son, Ld. (hereinafter called "the company"), appealed against an assessment to income tax in the estimated sum of 100,000*l.* for the year ending April 5, 1924.

The company was incorporated under the Companies Acts, 1862 to 1900, on December 14, 1905, and carried on business as timber merchants at Carpenters Road, Stratford.

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On August 8, 1921, a large quantity of timber, which was stored in the company's timber yard, was destroyed by fire. In respect of the timber so destroyed the company received in February, 1922, 477,838*l.* from various insurance companies.

The timber so destroyed consisted mainly of the best class of hardwood, which was purchased by the company seasoned, unseasoned or partly seasoned. A large quantity of seasoned wood which was taken into stock before the war was destroyed by the fire.

The company's accounts were made up to June 30 in each year, stocks being valued, following the usual practice, at cost or market value whichever was the lower, and for the purposes of this valuation large sums were in the last two years of account prior to the said fire written off the original cost prices of the stock in respect of depreciation in order to arrive at the closing stock values; and the reduced sums so arrived at were adopted each year in order to ascertain the company's profits for income tax purposes. In respect of the stock on hand at June 30, 1921, which was the subject-matter of this appeal, the sums so from time to time written off the stock values amounted in the aggregate to 107,000*l.* or thereabouts, and the total stock on hand at that date was thus valued in the company's accounts at 266,831*l.* after writing off the said sum of 107,000*l.*

For many years past the company had kept its stock in trade insured against loss or damage by fire, and had in computing its profits for income tax purposes been allowed to deduct the premiums paid by it in respect of the policies of insurance as an expense of its business. For the purposes of fire insurance the stock in trade of the company was valued at replacement value. At the date of the fire the value of the timber of the kind which constituted the greater part of the company's stock was very high, and the company accordingly claimed from the insurance companies concerned, and was paid by them, in respect of the replacement value of the stock so destroyed, the sum of 477,838*l.* 2*s.* 4*d.* Out of the sum of 477,838*l.* 2*s.* 4*d.* so received by the company the sum of 160,824*l.* (being part of the sum of 266,831*l.*, the value

of stock in hand at June 30, 1921), estimated by the company to be the written down value of the timber so destroyed, was brought into the company's accounts for the year ending June 30, 1922, as a trading receipt.

After deducting the sum of 2845*l.* for law charges, the sum of 1000*l.* for expenses of clearing the yard, and the said sum of 160,824*l.*, the balance of the moneys received from the insurance companies in respect of the destroyed timber, amounting to 313,168*l.*, was carried into the balance-sheet for the year ending June 30, 1922, as a reserve, but was not brought into the profit and loss account. Copies of the company's balance-sheets and profit and loss accounts for the years ending June 30, 1920, 1921 and 1922, were attached to and formed part of the case.

TRADING ACCOUNT FOR YEAR ENDING JUNE 30, 1922.

	£	s.	d.		£	s.	d.
To Stock in trade .	240,905	13	8	By Sales less returns	161,783	6	5
„ Purchases .	154,584	11	8	„ Stock in trade .	159,130	4	5
„ Freight . .	9969	4	9		320,913	10	10
„ Carriage and Cartage .	3618	13	0	„ Timber destroyed at estimated cost prices .	160,824	15	8
„ Lighterage .	2050	0	0				
„ Dock Dues .	547	1	9				
„ Insurance . .	3103	10	4				
„ Difference on dollars bought to provide for payment of American purchases which were in error paid otherwise, and so are charged as purchases at lower prices .	6439	5	9				
	421,218	0	11				
„ Balance being Gross Profit on Sales of which 25,925*l.* is caused by the error in the stocktaking at June, 1921 .	60,520	5	7				
	£481,738	6	6		£481,738	6	6

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FIRE ACCOUNT.

	£	s.	d.	£	s.	d.
Received from Insurances for Stock . . .				477,838	0	0
Stock at fire approximately same as at June, 1921, as Accounts	240,905	13	8			
Add error discovered by Somerset House official	25,925	0	0			
	266,830	13	8			
Less stock not burnt at cost prices .	106,005	18	0			
Stock destroyed at cost prices . .	160,824	15	8			
Law charges	2845	2	6			
Expenditure on clearing yard . . .	1000	0	0			
Balance transferred	313,168	1	10			
	£477,838	0	0			

In the balance-sheet on June 30, 1922, the sum of 313,168*l.* 1*s.* 10*d.* was placed to the credit of the reserve account as credit re fire and was not brought into the profit and loss account.

Mr. F. W. Gower, chartered accountant and advisory accountant to the Inland Revenue Commissioners, who was examined on behalf of the appellant (the inspector of taxes), stated in evidence that in his experience as a chartered accountant extending over twenty years the normal commercial method of dealing with moneys recovered by a trader under a policy of insurance in respect of stock destroyed by fire was to include the actual amount received in the accounts as an ordinary trading receipt in the same way as the proceeds of an ordinary sale of stock.

During the war the greater part of the company's trade consisted in supplying seasoned and specially selected timber of various kinds to Government departments and various aircraft contractors. The timber required for these purposes being of a special character had to be and was picked out from the company's stocks. The whole of the company's stocks of the required types of timber, such as silver spruce, mahogany, walnut and English ash, had (before the fire) been gone over in this way and the company was at the date of the fire left in possession only of such portions of those stocks as had not been found suitable for the above mentioned purposes. Since the armistice the company had done an increasing business with the motor body building and like

industries, and this class of business had led to demand for, and the company had stocked, timber of types and qualities different from those stocked by the company during and before the war. For this reason only a small portion of the timber destroyed by the fire had been replaced—namely, to an amount of 18,400*l.* or thereabouts. The word "replaced" in this paragraph included the purchase of timber suitable for purposes similar to those for which the destroyed timber was used, as well as timber of a precisely similar nature. The replacements by timber of a precisely similar nature to that destroyed were almost negligible.

At the date of the fire there was a boom, which was being prolonged by the adoption on the part of the larger timber merchants of a policy of holding up stocks; the high prices obtaining at that time, and on the basis of which the insurance companies paid the company's claim, were due to this boom. The timber destroyed was of such a character that it would have been practically impossible to have put it on the market without causing a glut and destroying the market for the time being.

It was contended by the appellant on behalf of the Crown (inter alia) that (*a*) the whole sum received from the insurance companies in respect of the destroyed timber, namely, 477,838*l.*, constituted a trading receipt and should have been brought into the company's profit and loss account for the year in question; (*b*) the amount of the assessment should be the sum of 85,456*l.* less 373*l.* for wear and tear.

It was contended on behalf of the company: (*a*) that no part of the sum received by the company from the insurance companies in respect of the destroyed timber constituted a trading receipt; (*b*) that no part of the difference between the said 160,824*l.* and the said 477,838*l.* constituted a trading profit.

The Special Commissioners, having considered the arguments and evidence adduced before them, gave the following interim decisions :—

1. "We are satisfied that the sum of 477,838*l.*, the sum recovered from the insurance companies, does not represent

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a trade receipt, and no part of the said sum is assessable as trade profits under Case I. of Sch. D.

2. "We are of opinion that the burned timber which has been replaced should be brought into stock at the original cost price of the timber."

Upon a further hearing which was granted to the parties in order to clear up alleged ambiguities in the Commissioners' previous decision as to the meaning to be attributed to the word "replaced" in para. 2 of their decision, the Commissioners held that in order to be a replacement the timber purchased need not be precisely similar to that burned; it was a replacement if it was timber suitable for similar purposes, and they fixed the amount of replacements at 18,400*l.*

The amount of the assessment having been agreed in accordance with these decisions the Commissioners reduced the assessment under appeal to nil.

The Crown appealed.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the appellant.

Sir John Simon K.C., *Latter K.C.* and *Cyril King* for the respondents.

ROWLATT J. In this case the question to be decided is what amount of the money received from the insurance company by the respondents, who lost a large part of their stock by fire, the loss being covered by insurance, they are to bring into their trading account for the purpose of income tax.

I have the trading account before me and it is in the normal form. It starts with the stock in trade in hand at the beginning of the year on the left hand side, then the amount of purchases and then the amount of expenses, and then there is the total. On the other side there is, of course, the amount of sales and the stock in trade that is left at the end of the year, that is totalled and the difference between the two would normally show the gross profit or the gross loss on the year's trading. But in the year in question, owing to the fire, some of the stock which they had at the beginning of the year and which they bought during the year

is not accounted for either by the sales or by the stock in trade which is left at the end of the year, because it has been burnt. How do the respondents bring that in? They bring that in as an item "timber destroyed." At what price do they bring that in? The timber is gone and the respondents have received money from the insurance companies in respect of the timber destroyed, but they do not bring in the money that they have so received instead of the timber. What they bring in is a figure representing the estimated cost price of the timber. That amounts to saying this, that the insurance is treated not as having provided money to take the place of the goods burnt, but as having prevented the fire; that is the long and short of it. It seems to me that the respondents must account for this timber that has been destroyed by fire; they have received the money from the insurance company in place of it. I can see no reason why that money should not be brought into the account instead of the timber. It does not seem to me to be difficult. But it is said by Sir John Simon that it is not the business of the respondents to have fires and to collect the insurance money from the insurance company. That may be a very attractive way of stating the respondents' contention, but the fact is that the respondents' business is to buy, hold and sell timber, and it is part of their business to insure timber while they have it, in order that if the timber is destroyed they may have the insurance money instead of the timber, and, in my judgment, they must treat that money in the same way as they would have treated the timber—namely, as an item in their trading account. In my judgment quite clearly the appeal of the Crown ought to be allowed.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Ward, Perks & Terry.*

R. F. S.

C. A.
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Dec. 9.

[IN THE COURT OF APPEAL.]

DE VRIES *v.* SMALLRIDGE.

County Court—Jurisdiction—Action for Declaration—No Sum of Money claimed—"Personal Action"—Contract for Sale of Realty—Deposit—Specific Performance—Purchase Money exceeding 500l.—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 56, 67.

The county court has no jurisdiction to entertain a claim for a declaration in an action in which no sum of money is claimed :—

So *held* by Scrutton and Atkin L.JJ. and Eve J.

Rex v. *Cheshire County Court Judge* [1921] 2 K. B. 694 followed; *Simpson* v. *Crowle* [1921] 3 K. B. 243 approved; *Stiles* v. *Ecclestone* [1903] 1 K. B. 544 overruled.

Upon a contract for the sale of real property at a price exceeding 500*l.* the vendor brought an action in the county court against the purchaser claiming a declaration that the defendant had forfeited the deposit paid under the contract by the defendant to stake-holders, who were not parties to the action, and that he was entitled to receive payment of the deposit from the stake-holders. No other claim appeared in the plaint or the summons or the particulars of claim.

Held, that the county court had no jurisdiction to entertain the claim.

By Scrutton and Atkin L.JJ. and Eve J. as mentioned above.

By Eve J. on the further ground that the claim was for partial specific performance of an agreement for the sale of property within the meaning of s. 67 of the County Courts Act, 1888, where the purchase money exceeded 500*l.*, the amount limited by that section.

APPEAL from the judgment of a Divisional Court.

On March 18, 1927, the plaintiff lodged a plaint in the Bloomsbury County Court of Middlesex in an action expressed to be "Between Ysbrand De Vries (Male), plaintiff, and Mittle Mildred Smallridge (Married Woman) . . . . defendant." The defendant was summoned to appear at the county court to answer the plaintiff to a claim, the particulars of which were annexed and are stated below. The summons proceeded in the words and figures following :—

"Debt or claim . .			
Costs of plaint . .	2	0	0
Solicitor's costs . .	1	11	9
Total amount . .			"

. . . .

The particulars of claim were as follows : "The plaintiff's claim against the defendant is for a declaration that under

an agreement dated October 12, 1926, made between the plaintiff of the one part and the defendant of the other part being a contract for the sale and purchase of freehold premises known as No. 3 Upper Addison Gardens, Kensington, in the County of London (which said agreement incorporated the statutory conditions of sale 1925) the defendant has forfeited the deposit of 100*l.* paid to Messrs. Griffinhoofe & Brewster . . . . as stake-holders, and the plaintiff further claims a declaration that the plaintiff is entitled to receive payment of the said deposit from the said stake-holders. Dated," etc.

The grounds of defence were that—

1. The defendant was induced to enter into an agreement to purchase the premises on the express statement of the plaintiff that the property was an unrestricted freehold whereas in fact, as the plaintiff well knew, it was subject to onerous restrictions.

2. The plaintiff was informed by the defendant before the agreement that she wanted the premises for use as a boarding house or for letting in apartments and not as a private dwelling-house.

3. The defendant was also informed that the said restrictions when brought to her notice were inoperative, as they were only in force during a lease which had merged, which information was incorrect, as the plaintiff knew or ought to have known.

4. The agreement was conditional upon a mortgage being obtained as set out in the agreement, and owing to the aforesaid restrictions the defendant was unable to obtain the required advance and the plaintiff was also unable to obtain an advance for the defendant.

The purchase money of the premises was 750*l.* The deposit of 100*l.* was paid by the defendant to the stake-holders. The case came before the county court judge on April 28, 1927, and he ordered the action to be struck out for want of jurisdiction. On appeal Bankes and Lawrence L.JJ., sitting as a Divisional Court of the King's Bench Division, ordered a new trial on the ground that the King's Bench Division was bound to follow the decision in *Stiles* v. *Ecclestone* (1); but

(1) [1903] 1 K. B. 544.

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they gave the defendant leave to appeal to the Court of Appeal.

The defendant appealed.

S. P. Kerr for the appellant. This case is covered by *Rex* v. *Cheshire County Court Judge* (1) in the Court of Appeal, where it was decided that an action in which no debt or damage or demand in money is claimed is not a personal action within s. 56 of the County Courts Act, 1888 (2), and therefore cannot be brought in the county court. Sect. 73 of the Act of 1888 and Order v., rr. 1 and 2, of the County Court Rules, 1923 (2), show this to be the intention of the Act. The jurisdiction of the court, formerly under s. 89 of the Judicature Act, 1873, and now under s. 202 of the Judicature Act, 1925, to make a declaration, is merely an ancillary jurisdiction. That court has no power to make a declaration as the only relief sought in an action. Bankes and Lawrence L.JJ., sitting in the King's Bench Division, followed *Stiles* v. *Ecclestone* (3) out of respect for the decision of a Court of three judges in that Division, but in truth that case has been overruled by *Rex* v. *Cheshire County Court Judge*. (1)

[SCRUTTON L.J. That seems to have been the opinion of Bray and Lush JJ. in *Simpson* v. *Crowle*. (4)]

A. H. M. Wedderburn for the respondent. *Rex* v. *Cheshire County Court Judge* (1) is distinguishable, because there the plaintiff had no cause of action for any debt or damages and therefore could never have issued a plaint for a money claim. In *Stiles* v. *Ecclestone* (3) the plaintiff had a claim for liquidated damages for breach of a stipulation in a contract of employment. The claim was within the jurisdiction of the county court. It was not in fact put in suit, but it might have been. It was held that in these circumstances an action for an injunction to restrain further breaches might be brought in the county court without any claim for damages. The present case is on all fours with that case. The respondent has a claim, although he has not put it in suit,

(1) [1921] 2 K. B. 694.
(2) See note on p. 491, post.
(3) [1903] 1 K. B. 544.
(4) [1921] 3 K. B. 243.

for money in the hands of the stake-holders. The deposit is intended as part payment of the purchase money if the contract of sale is carried out and as liquidated damages if it is not performed by the purchaser, an event which has happened. The claim is for 100*l.*, that is within the jurisdiction of the county court. *Stiles* v. *Ecclestone* (1) was cited in *Rex* v. *Cheshire County Court Judge* (2), and distinguished by Younger L.J., but not overruled. An action for an injunction or for a declaration simply may be brought in the county court if it is referable to an existing claim which, if put in suit, would be within the jurisdiction of the court.

[EVE J. referred to s. 67 of the County Courts Act, 1888.] That section limits the jurisdiction of the county court in actions for specific performance of contracts for the sale of property to cases where the purchase money does not exceed 500*l.* But the relief sought in this case is not referable to a claim for specific performance but to a claim for debt or damages.

Counsel was not called upon in reply.

SCRUTTON L.J. In my opinion the plaint in this action was a bad plaint and the summons a bad summons in that neither of them contains a statement of any debt or claim whatever. The particulars of claim state that "the plaintiff's claim against the defendant is for a declaration that . . . . the defendant has forfeited the deposit of 100*l.* paid to Messrs. Griffinhoofe & Brewster . . . . as stake-holders, and the plaintiff further claims a declaration that the plaintiff is entitled to receive payment of the said deposit from the said stake-holders," who were not in fact parties to the action. Therefore the debt or claim was not a money claim. The county court judge, acting on the authority of *Rex* v. *Cheshire County Court Judge* (3), declined to hear the case, because in his view, there being no money claim, the county court had no jurisdiction to grant a declaration. Thereupon the plaintiff appealed, and the

(1) [1903] 1 K. B. 544.
(2) [1921] 2 K. B. 694, 713.
(3) [1921] 2 K. B. 694.

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appeal came before two members of the Court of Appeal sitting as a Divisional Court of the King's Bench Division. Their attention was called to the fact that a Divisional Court of three judges had in *Stiles* v. *Ecclestone* (1) held that an action in which the only relief claimed was an injunction was within the jurisdiction of the county court, provided that the plaintiff had a claim for damages which, if he had put it in suit, would have been within the jurisdiction of the court. In *Rex* v. *Cheshire County Court Judge* (2) the plaintiff had no legal claim for damages. In this state of the authorities the two Lords Justices who constituted the Divisional Court in this case thought they ought to observe the rule of that Court, which is to respect the decision of a Court of three judges, and so they reversed the judgment of the county court judge and gave the defendant leave to appeal to this Court. Having now heard the case we think that in *Rex* v. *Cheshire County Court Judge* (2) the Court of Appeal decided the point in dispute and held that in order to bring a personal action like the present within the jurisdiction of the county court a money claim must be the subject of the plaint and particulars, and that the jurisdiction of the court by way of injunction or declaration, being only an ancillary jurisdiction, is not available unless the claim or demand is one which can be the subject of a plaint within the jurisdiction of the court. That is the result of the three judgments in *Rex* v. *Cheshire County Court Judge*. (2) It follows that *Stiles* v. *Ecclestone* (1) was wrongly decided. The same view was taken in *Simpson* v. *Crowle* (3) by Bray and Lush JJ., who had before them the report of *Rex* v. *Cheshire County Court Judge* (2), and who held that the county court has no jurisdiction to grant an injunction where there is no money claim. The result is that the appeal must be allowed.

In my opinion there is another fatal objection to this plaint. It relates to a deposit paid on a contract of sale

(1) [1903] 1 K. B. 544. (2) [1921] 2 K. B. 694.
(3) [1921] 3 K. B. 243.

of freehold premises for 750*l*. In order to make a declaration of the right to the deposit it would be necessary to decide whether there was a valid contract of sale of the property. The defendant says she entered into the contract on the express statement of the plaintiff that the property was freehold and free from restrictions, whereas in fact it was to the knowledge of the plaintiff subject to restrictions which prevented her from putting it to the use for which she required it. Thus the county court would have to decide the rights of the plaintiff under a contract for the sale of property where the purchase money was 750*l*. while the equitable jurisdiction of the court is limited to cases where the purchase money does not exceed 500*l*. But I need not decide this point, because *Rex* v. *Cheshire County Court Judge* (1) binds us to hold that where a plaint in the county court contains no money claim but only asks for a declaration it is not within the jurisdiction of the court.

ATKIN L.J. I am of the same opinion. The action was for a declaration that the plaintiff was entitled to a sum of money paid as a deposit into the hands of stake-holders who were not parties to the action. That form of action is not within the jurisdiction of the county court, which is entirely a statutory jurisdiction. The only section relied on by the plaintiff as enabling him to bring the action is s. 56 of the County Courts Act, 1888, but in my opinion the point he raises has already been decided against him in *Rex* v. *Cheshire County Court Judge*. (1) In that case the plaintiff had brought an action in the county court against a trade union for a declaration that a resolution of the union purporting to expel the plaintiff was ultra vires and void, and for an injunction to restrain the union from acting upon it. The particulars of claim contained no claim for damages. In the circumstances of that case there could not be a claim for damages, because a member of a union cannot recover damages against the union for being expelled from it, even though the expulsion was illegal. The Court of Appeal,

(1) [1921] 2 K. B. 694.

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upholding the decision of the county court judge, held that s. 56 of the County Courts Act, 1888, conferred on the county court no jurisdiction to entertain an action in that form, because the words "personal actions" in that section mean actions to enforce money claims not exceeding the amount over which the court has jurisdiction. If there is a money claim within the jurisdiction of the court, then no doubt the court can give ancillary relief by way of declaration or injunction, but if there is no money claim within the jurisdiction of the court, or if there is no money claim at all, then the court has no jurisdiction to give that relief. In the course of his judgment in *Rex* v. *Cheshire County Court Judge* (1) Lord Sterndale M.R. said: "I think it follows, if I am right in what I have said, that the declaration or the injunction can only be granted where there is an action such as is described in s. 56 of the County Courts Act, 1888, and where the plaintiff has established a right to relief in that action. If the declaration or the injunction is merely ancillary to the other relief, as I think it is, then you must have established the right to the other relief in the action." To explain what the other relief is, there are the plain statements of the other Lords Justices. Scrutton L.J. said (2): "The other view is that it is essential to the jurisdiction of the court that there should be a money claim not exceeding 100*l*. That I think is the true view of the section, and in that view it is essential that the plaint should show that the money claim made does not exceed 100*l*." The Lord Justice goes on to say that in that case there was intentionally no claim for money, and then, after referring to the definition of personal actions given in vol. iii. of Blackstone's Commentaries, p. 117, as actions "whereby a man claims a debt, or personal duty, or damages in lieu thereof," Scrutton L.J. continues thus (3): "The idea of something which was not a claim for money founded on contract, or a claim for money founded on tort, but was a demand for a declaration, I think never occurred to Sir William Blackstone, and I do not think, when the Legislature

(1) [1921] 2 K. B. 694, 700. (2) [1921] 2 K. B. 706.
(3) [1921] 2 K. B. 709.

used the phrase 'personal actions' it was thinking of any such matter as declarations, which were practically unknown in the county court." Younger L.J. in the same case said (1): "The first question one asks oneself is, What are the personal actions which under that section"—s. 56 of the County Courts Act, 1888—"may be brought in the county court? and as a matter of construction I myself have no doubt that the words which follow the words 'personal actions'—namely, 'when the debt demand or damage claimed is not more than 100*l*., whether on balance of account or otherwise'—are all of them words of qualification of the words 'personal actions,' and that no personal action with regard to which you are unable to say that it is one where the debt demand or damage claimed is not more than 100*l*., whether on balance of account or otherwise, is a personal action within the jurisdiction of the County Courts Act under this section at all. If I had any doubt upon the question whether the section could be construed as extending, as has been suggested, to actions for declarations or other incidental relief or for any form of order that may be made in any personal action not in itself involving the payment by the defendant of any sum of money, it would, I think, be resolved by the last words of the sentence which I have read that 'all such actions'—that is to say, the personal actions which are previously referred to—'shall be heard and determined in a summary way.' It appears to me that those words undoubtedly confirm the view that one would apart from them take of the section, that what is referred to are actions of the description stated resulting in a money claim and a money payment, either in the form of debt or damages, and that it is not intended to refer to or comprise vague things like declarations which, not resulting in payment directly by the defendant to the plaintiff, may nevertheless affect their relations in respect of property which in point of value is beyond any limit of value in any section of the County Courts Act." That statement is perfectly plain. The fact that the declaration sought in the present action relates to

(1) [1921] 2 K. B. 712.

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a sum which is not in amount beyond the jurisdiction of the county court does not in any way qualify the decision of Younger L.J. that the claim in question in *Rex* v. *Cheshire County Court Judge* (1) was not a money claim and therefore that the action was not a personal action within s. 56 of the County Courts Act, 1888. That decision binds us. In my opinion it overrules *Stiles* v. *Ecclestone* (2), and this was also the view taken by Bray and Lush JJ. in *Simpson* v. *Crowle*. (3) The result is that the appeal must be allowed and the judgment of the county court judge must be restored.

EVE J. I agree. The first question, whether there can be a claim in the county court for a declaration simply, and without a money claim, is concluded by *Rex* v. *Cheshire County Court Judge*. (1) With regard to the second point—namely, the jurisdiction of the court under s. 67—the court has all the powers and authority of the High Court, by sub-s. 4: "For specific performance of or for reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of any property, where in the case of a sale or purchase the purchase money, or in the case of a lease the value of the property, shall not exceed the sum of 500*l*." Mr. Wedderburn presented this claim to retain the deposit as if it were a claim for damages for breach of an agreement which had been repudiated by the defendant. That is not in truth the relief sought. The claim is really for partial specific performance based on the non-performance of an agreement by the defendant, whose default is said to entitle the plaintiff to claim from certain stake-holders payment of a sum deposited with them. Whether that claim is a valid one depends upon the terms of a contract of sale, and a declaration that the plaintiff is entitled to retain the deposit is pro tanto a decree for specific performance, for it is only by the terms of the contract that the plaintiff's right to retain the deposit can arise. This is not a case of a purchaser claiming rescission of a contract, where the Court may come to the conclusion

(1) [1921] 2 K. B. 694. (2) [1903] 1 K. B. 544.
(3) [1921] 3 K. B. 243.

that he is entitled to the return of the deposit. The claim in the present case is that upon the true construction of the contract and in the events which have happened the plaintiff, the vendor, is entitled to retain the deposit. That claim raises questions not only of the construction, but also of the right to performance, of a contract for the sale of property where the purchase money exceeds 500*l*. The claim is therefore outside the jurisdiction of the county court, as limited by s. 67. The appeal must therefore be allowed on this ground also.

Appeal allowed.

Solicitors for appellant: *Griffinhoofe & Brewster.*
Solicitor for respondent: *N. Ramsay Murray.*

NOTE.

County Courts Act, 1888, s. 56: "All personal actions, where the debt, demand, or damage claimed is not more than [one hundred pounds, see 3 Edw. 7, c. 42, s. 3] whether on balance of account or otherwise, may be commenced in the [county] court, and all such actions shall be heard and determined in a summary way according to the provisions of this Act: Provided always that, except as in this Act provided, the court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or for any libel or slander, or for seduction, or breach of promise of marriage."

Sect. 73: "On the application of any person desirous to bring an action under this Act, the registrar of the Court shall enter in a book to be kept for this purpose in his office a plaint in writing, stating the names and last known places of abode of the parties, and the substance of the action intended to be brought . . . . and thereupon a summons, stating the substance of the action . . . . shall be issued under the seal of the Court, according to such form . . . . as shall be prescribed." . . . .

By Order v., r. 1, of the County Court Rules, 1903 to 1926, all proceedings authorized to be commenced in a county court by the County Courts Act, 1888, shall, except where otherwise provided, be commenced by the entry of a plaint. By r. 4: No plaint shall be entered without the party entering the same filing at the office of the registrar a praecipe for that purpose which is to contain, among other particulars, "a short statement of the cause of action, or remedy or relief sought, and the amount of the debt or damages claimed." By Order VII., r. 1, at the time of entering the plaint the registrar is to give to the plaintiff a note under the seal of the Court according to the appropriate form in the Appendix to the Rules. By r. 2: A summons to appear to a plaint shall be according to one or other of the forms in the Appendix. Form 22 in the Appendix is in the following form; after stating

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the names of the Court and the parties: "You are hereby summoned to appear at a county court to be holden," etc., "to answer the plaintiff to a claim, the particulars of which are hereunto annexed:—

		l.	*s.*	*d.*
Debt or claim				
Costs of plaint				
Solicitor's costs				
Total amount	£			

Dated," etc.

W. H. G.

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HUMBER CONSERVANCY BOARD *v.* FEDERATED COAL AND SHIPPING COMPANY, LIMITED.

Shipping—Pilotage—Compulsory Pilotage in Pilotage District—"Navigating . . . . for the purpose of . . . . making use of any port"—Lloyd's Signal Station—"Port"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 742—*Pilotage Act,* 1913 (2 & 3 *Geo.* 5, *c.* 31), *ss.* 11, *sub-s.* 1; 62—*Declarations in county courts.*

A ship came within a compulsory pilotage district for the purpose of obtaining by signalling orders as to her port of destination from one of Lloyd's signalling stations, and did not take a pilot:—

Held, that the signalling station, although a "place," was not a port within the meaning of s. 11, sub-s. 1, of the Pilotage Act, 1913, as modified by s. 742 of the Merchant Shipping Act, 1894, and that, consequently, the vessel was not "navigating . . . . for the purpose of . . . . making use of any port" within the above sub-section, and was not, therefore, obliged to take a pilot.

Observations as to declarations in county courts.

APPEAL from Hull County Court before Scrutton and Sargant L.JJ. sitting as a Divisional Court of the High Court.

The plaintiffs, the Humber Conservancy Board, claimed from the defendants, the Federated Coal and Shipping Company, Ld., the sum of 3*l.* 10*s.* as pilotage dues in respect of the defendants' ship *Maud Llewellyn*, and also claimed a declaration that the above ship "entered the Humber pilotage district on April 22, 1926, for the purpose of making use of Spurn within such district, and was bound to be under the compulsory pilotage of a licensed pilot of such district and failed to take the services of such a licensed Humber pilot." The latter, on April 22, 1926, being on a voyage in ballast

from Morocco to a north coast port, approached to within about one and a half miles of Spurn Point in order to communicate with Lloyd's signal station there situate and receive orders as to the port to which she was to proceed. She received, by flag signals from the station, orders to proceed to Methil, and, without entering the Humber or taking a pilot, although a pilot offered his services, proceeded on her voyage. In approaching Spurn Point the vessel entered a compulsory pilotage district, and the plaintiffs claimed the above dues under s. 11, sub-s. 1, of the Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), which enacts that "Every ship . . . . while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district . . . . shall be . . . . (*a*) under the pilotage of a licensed pilot of the district." By s. 62 the Act was to be construed as one with the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), and s. 742 of that Act enacts that "'Port' includes place." The plaintiffs claimed that Spurn Point was a place and therefore a port within that definition and that the defendants' ship had navigated in the pilotage district for the purpose of making use of that port. Spurn Point has a trolley line, four houses, a signal station and a lighthouse.

The county court judge held that Spurn Point was a port, and gave judgment for the plaintiffs for the amount claimed.

The defendants appealed.

A. T. Miller K.C. and *W. H. Owen* for the defendants. The county court judge was wrong in holding that Spurn is a port. The elements which go to make a port are fully set forth by Sir Matthew Hale in his treatise "De portibus maris" (1), quoted with approval by Lord Halsbury in *Hunter* v. *Northern Marine Insurance Co.* (2) Hale describes a port as "an haven, and somewhat more. 1st. It is a place for arriving and unlading of ships. . . . . 2nd. It hath a superinduction of a civil signature upon it, somewhat of

(1) Hargrave's Law Tracts, p. 46. (2) (1888) 13 App. Cas. 717, 722.

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franchise and privilege. . . . . 3rd. It hath a ville or city or borough, that is the caput portus, for the receipt of mariners and merchants, and the securing and vending of their goods and victualling their ships." And on the same page Hale describes a haven as "a place of a large receipt and safe riding of ships, so situate and secured by the land circumjacent, that the vessels thereby ride and anchor safely." Spurn Point is certainly none of these things and is clearly not a port in the ordinary meaning of the word. But it is said that it is a place and therefore a port within the definition in s. 742 of the Merchant Shipping Act, 1894. It is certainly a place, but as it is obvious that while every port is a place, every place is not a port, "place" must have a more limited meaning. It is contended that it means a place which has some of the characteristics of a port only; a place ejusdem generis as a port: see Maxwell on the Interpretation of the Statutes, 6th ed., p. 574, Spurn Point has nothing which makes it resemble a port in any respect, and therefore is not a place within the meaning of s. 742 of the Act of 1894, and, consequently, is not a port within s. 11, sub-s. 1, of the Act of 1913.

Balloch for the plaintiffs. The defendants' ship was in the pilotage district for the purpose of using a port, inasmuch as she received orders from it. Spurn Point is a place and therefore a port, because it offers one of the facilities of a port, namely, a signalling station, and that is sufficient to constitute Spurn Point a place in the nature of a port and therefore a port.

SCRUTTON L.J. This case raises a short point with reference to a claim for pilotage at the mouth of the Humber. A British steamship, the *Maud Llewellyn*, was apparently chartered to load coal at some port on the north-east coast, with a provision that she should call at Spurn for orders, Spurn Point being a well known signalling station at the mouth of the Humber. She directed her course to Spurn and got inside the compulsory pilotage district of the Humber Conservancy Board. It does not appear

whether she showed her flags and the signalling station gave her information, or whether she asked the signalling station for orders. But the information was communicated to her by flags that she was to go to Methil, a port on the Scotch coast, and she proceeded without stopping. Thereupon a claim was made upon her by the Humber Conservancy Board for pilotage dues, and whether she was liable depends upon the meaning to be attached to s. 11, sub-s. 1, of the Pilotage Act, 1913, which reads: "Every ship . . . . while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district" must carry a pilot. The first question therefore is: Was the *Maud Llewellyn* in what she did "entering, leaving, or making use of any port in the district"? She certainly was not doing anything in relation to any of the recognized ports of Hull, Grimsby or Immingham in the Humber Conservancy District. What is said is that she was getting information by signal from Spurn, and Mr. Balloch for the plaintiffs very properly, considering his extensive commercial knowledge, has shrunk from saying that Spurn is a port. But it is said that the Merchant Shipping Act, 1894, is incorporated with this Act, and that if one turns to the definition section 742 of that Act one finds that, unless the context requires otherwise, "Port includes 'place.'" Spurn appears to be a very good place for a rest cure; it is at the extreme end of a spit of sand with no road but with a trolley line to it, with four inhabitants, a Lloyd's signalling station and a lighthouse, and it has been argued that, whatever else it is, it is a "place," and as "port" includes "place," the *Maud Llewellyn*, when she received signals from it, was making use of a "place" which is the same as "port." In my view that is putting much too wide a meaning on the word "place." I think that "place" following "port" must be interpreted as ejusdem generis with "port," as a locality having some or many of the characteristics of a port, though by reason of the absence of charter or other reasons one would not speak of it as a port. I am quite clear that

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Spurn is not a port. I am equally clear that it is not ejusdem generis with a port. That being so the whole foundation for the claim for pilotage goes, because unless there is a port to begin with which is to be either entered, left or made use of, there can be no claim for pilotage dues. It is not necessary therefore to consider and we have not heard argued whether to receive information by signals or wireless from a signalling station or lighthouse is making use of a port. There is a decision of Bailhache J., namely, *Cannell and the Corporation of Trinity House* v. *Lawther, Latta & Co.* (1), as to which I only wish to say this, that I should require liberty to examine it should that case ever come before me in any Court in which I could effectively deal with it. I must not be considered as taking the view at first sight that that case is right. But it is unnecessary to consider that point. I only wish to say this further. For some odd reason the plaintiffs began by claiming a declaration, and followed it by a claim for 3*l.* 10*s.* We have said several times in this Court that much too much use is being made of declarations in the county court. I need only refer to two recent cases, *Smith* v. *Smith* (2) and, in the Court of Appeal, *Rex* v. *Cheshire County Court Judge and United Society of Boilermakers* (3), where some very relevant remarks of Lord Sterndale will be found. Declarations are only to be asked as ancillary to money claims. In what sense the declaration asked for in this case is ancillary to a claim for 3*l.* 10*s.* I have been quite unable to understand. It is asked that the learned judge should declare the facts or some of the facts which it is necessary to establish in order to make a claim for 3*l.* 10*s.* But one might as well put in a claim for a declaration that he should give judgment for 50*l.* or 100*l.* People ask for declarations without thinking what they want declarations for.

In my opinion this appeal should be allowed.

SARGANT L.J. I agree. I notice that in his judgment the learned county court judge says: "Mr. Owen contended

(1) [1914] 3 K. B. 1135. (2) [1925] 2 K. B. 144.
(3) [1921] 2 K. B. 694.

that the reason why the definition of 'port' includes 'place' was that a 'place' could only be a port strictly by charter, and in order to get rid of this technical difficulty the word 'place' was inserted in the definition in the form "Port" includes place." I cannot accept Mr. Owen's argument." It seems to me that that argument was essentially a sound argument, and that the Merchant Shipping Act, 1894, in adding to the word "port" that it includes "place" was dealing with some such difficulty as that indicated in Mr. Owen's argument, and that "port" is to be deemed to include "place," because there are certain places which have all or most of the facilities and advantages of a port which might not be strictly within the word "port." It seems to me that it is straining the words to an undue extent to say that in this compulsory pilotage Act any place such as Spurn Point, which has not one of the facilities of a port, should be held to be a port, because of the extended meaning given to "port" in the Merchant Shipping Act, 1894.

The only other remark I should like to make is, that in *Cannell's* case, the case before Bailhache J. (1), there was something a good deal more than the sending of a signal by sight. What happened was that a message was taken out to the ship from the port of Dover by a boat, and of course the facility of being able to communicate with a ship in this way is one of the facilities which appertain to a port.

Appeal allowed.

Solicitors for defendants: *Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitors for plaintiffs: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

(1) [1914] 3 K. B. 1135.

W. L. L. B.

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1927
July 7.

[IN THE COURT OF APPEAL.]

FULLWOOD *v.* HURLEY. (1)

Principal and Agent—Hotel Broker acting for Vendor—Purchaser—Double Commission.

The plaintiff, a hotel broker, in answer to an inquiry by the defendant, sent to him a list of hotels for sale accompanied by orders to view and by a letter which concluded, "if business is done, we shall act for you at the usual brokerage." The defendant viewed one of the hotels on the list, and after direct negotiations with the owner, purchased it. The owner paid 134*l.* commission to the plaintiff, who subsequently sued the defendant for an additional commission of 66*l.* 5*s.*, alleging a contract on the terms of the letter :—

Held, that the terms of the letter were not sufficient to establish a contract by the defendant, as purchaser, to pay a double commission to the plaintiff, and that the plaintiff, who was plainly acting as agent to the vendor, was not entitled to enter into such a contract with the defendant without the fullest disclosure to both vendor and purchaser, which he had failed to make or show.

Decision of the Divisional Court affirmed.

APPEAL from the Divisional Court.

The plaintiff, trading as "Fullwoods," and carrying on the business of a hotel and public house broker, general business transfer agent and licensed valuer, sued the defendant for 66*l.* 5*s.* for services rendered by the plaintiff, as hotel broker, to the defendant in connection with the purchase by the defendant of the Hunt Hotel, Leighton Buzzard. The defendant denied that he was indebted to the plaintiff and that the latter had rendered him any service as a hotel broker as alleged.

In July, 1926, the defendant called at the plaintiff's office and asked for particulars of hotel businesses for sale. On July 6, 1926, the plaintiff wrote to the defendant a letter as follows : "Dear Sir. Further to your call upon us yesterday afternoon, we enclose herewith instructions and particulars of the following properties which may interest you." Then followed a catalogue of houses, including the Hunt Hotel, and the letter concluded : "We shall be glad to know your decision in due course, and if business is done we shall act for you at the usual brokerage." Accompanying the letter

(1) The publication of this and the two following cases has been delayed by the lamented death of the reporter.

were orders to view the houses comprised in the catalogue, each containing the following special notice: "In the event of terms being arranged, you are requested to pay the usual 10 per cent. deposit to Messrs. Fullwoods, otherwise you will become equally liable with the vendor for the commission. This order is issued on this express condition only. . . . ."

The defendant inspected the Hunt Hotel under the order to view, and ultimately negotiated directly with Mrs. Lloyd, the owner, and entered into a contract with her for the purchase of the hotel, and at the end of July the purchase was completed. The plaintiff received full commission of 134*l.* from Mrs. Lloyd, and now made the claim in this action against the defendant for an additional commission of 66*l.* 5*s.* as being due to him upon the terms of the letter above set out, alleging that there was a contract by the defendant to pay him this second commission on the sale of the hotel.

The action was tried in the Leighton Buzzard county court, and the effect of the evidence given at that trial appears from the following judgments of the Master of the Rolls and Scrutton L.J. The county court judge gave judgment for the plaintiff on the ground that the plaintiff had shown that there was a contract on the part of the defendant to pay the commission. The Divisional Court (Bankes L.J. and Roche J.) reversed that decision, and the plaintiff appealed.

The appeal was heard on July 7, 1927.

G. F. Emery for the appellant. There was a contract on the part of the defendant to pay the plaintiff commission. The terms of the letter of July 6, to which the defendant raised no objection, constituted the contract by which the defendant is bound.

[LORD HANWORTH M.R. You cannot spell a contract out of the letter. The plaintiff as agent for the vendor could not impose upon the defendant, as purchaser, a commission from him as well, because the plaintiff as such agent was under disability at the time, unless the vendor knew of it.]

The defendant knew all the facts and made no objection to the plaintiff acting for him. There was also evidence

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at the trial that in the hotel trade there is a custom that there should be double commission.

Upon the principle of *Carlill* v. *Carbolic Smoke Ball Co.* (1) I submit that the plaintiff is entitled to judgment.

du Parcq K.C. and *C. W. Measor* for the respondent were not called upon.

LORD HANWORTH M.R. stated the facts above set out and continued: It was quite plain that the order to view the Hunt Hotel was issued because Messrs. Fullwoods were the authorized agents of the vendor, and therefore entitled, and they had a duty, to issue an order to view to such proper persons as they thought would be suitable and who had asked to have the opportunity of seeing whether the property was such as they wished to buy. The order to view having been issued, the defendant looked at the Hunt Hotel, and ultimately came to a contract with the owner, Mrs. Lloyd, under which he bought the hotel.

There would be in course of completion a number of matters to settle up on the transfer of the hotel. The plaintiff has received 134*l.* as a commission (and not an insignificant one) from the vendor. He now makes his claim in this action against the purchaser for an additional commission of 66*l.* 5*s.* as being due to him upon the terms of this letter, alleging that there was a contract by the defendant, the purchaser, to pay him this second commission on the sale of the Hunt Hotel.

The way in which the case is put is this: It is said that it is a practice in the trade for one person to act for both parties. That may be so on completion, when measurements or valuations have to be made of the stock and goods at the hotel. The plaintiff said in his evidence: "I told the defendant, 'We shall expect brokerage.' The defendant did not argue the matter in any way with me. He did not repudiate liability in any way." Then he said in cross-examination: "I did not tell the defendant personally that he would have to pay commission, but he must have known it."

(1) [1893] 1 Q. B. 256.

On the other side the evidence is that the defendant saw this order to view, which I think includes the letter, and made no objection. Upon that the learned county court judge says this: "He accepted the order to view—which, as I have said, I think includes the letter—and made no objection to the terms of that order with regard to commission, and there must be judgment for the plaintiff."

In the opinion that I have formed there was no evidence to justify that finding and to establish that a contract had been made between the plaintiff and the defendant to pay this second commission. The plaintiff's position is quite clear, and made quite clear from the terms of what we have called the order to view, that is to say that he was at that time acting for the vendor; he was the agent for the vendor, owing a duty to his principal, and intending to receive and being entitled to receive under the conditions a commission from the vendor. That being his position, he was in accordance with his duty disentitled so to engage in a second agency with the purchaser, an agency which would conflict with his duty towards his original principal, the vendor, a position which, unless it was assented to with full knowledge by his original principal, could not be maintained by him as an agent at all. All that the evidence shows is that the defendant made apparently no objection, that he was conscious of the terms of this letter, and that letter said that if business were done, "We shall act for you at the usual brokerage." In my judgment those terms are not sufficient to enable the plaintiff to say that a contract had been made between himself and the purchaser that the purchaser should pay him a second commission, especially as it was plain to both parties that at that time the plaintiff was the agent for the vendor, and not entitled to enter into such a contract with the defendant, unless there had been a full knowledge and assent on the part of Mrs. Lloyd to this subsequent dealing between the defendant and her established agent. The evidence seems to me to fall far short of what would be necessary to establish the right of the plaintiff to recover, if it could be established. It would be necessary to have

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some evidence, strong and cogent, to show that Mrs. Lloyd placed her agent in the position of being at liberty to engage in a fresh contract with the purchaser before he could be in a position to enter into any such contract as is contained in those words in the letter. "Not objected to by the defendant" falls far short of what is necessary.

It cannot be stated too plainly that an agent must not accept commissions from both sides, that if there are two commissions that are to be received it must be on the basis of the actual work being done for both parties with the assent of both parties after full knowledge. If such knowledge is afforded and it is made plain what position the agent occupies, then it is possible for the agent to act between the parties, but if and so long as the agent is the agent of one party, he cannot engage to become the agent of another principal without the leave of the first principal with whom he has originally established his agency.

In the present case I have come to the conclusion that there was no contract established such as to justify the plaintiff's claim. I agree therefore with the decision of the Divisional Court, that the plaintiff's claim fails. The appeal will be dismissed with costs.

SCRUTTON L.J. I have come to the same conclusion, though I feel that if I did know all the facts, it is quite possible that the defendant, who was said to be a very experienced gentleman, might not have my sympathy. Also I am not quite sure that I agree with all the remarks which the Divisional Court are said to have uttered in the very short report which we have. As my Lord has done, I wish to emphasize the view that the law takes of these double commissions. No agent who has accepted an employment from one principal can in law accept an engagement inconsistent with his duty to the first principal from a second principal, unless he makes the fullest disclosure to each principal of his interest, and obtains the consent of each principal to the double employment. That Messrs. Fullwoods' manager quite misunderstood his rights is obvious from the

statement he admits he made: "I did say I could have got the property for 500*l.* less than the purchaser would give." If as agent for the vendor he is negotiating price, and knows that his principal will take a named figure, by no possibility could he use that knowledge to get the property for the purchaser at 500*l.* less than the purchaser was inclined to pay. That answer given by him shows that he completely misunderstands the legal relation which results from a man attempting to get commission from each side.

The main ground, however, upon which I decide this case is that I do not think the plaintiff shows any real contract to pay this commission; and in view of the nature of the contract that he desired to establish, that is to say, a contract that an agent employed by one principal shall be paid commission by another, it is essential in my view to make that contract perfectly clear to the party against whom he is claiming. The order to view contains nothing which puts a liability on the purchaser to pay purchaser's commission to the agent. It does give the purchaser notice that there is some agreement or other between the vendor and the agent for commission, but that is not enough. It is not enough merely to give notice that there is a commission, leaving the purchaser to inquire what it is and how much. It is the agent's duty to make the fullest disclosure on his second contract of all the benefit he is getting out of it, and I think Mr. Emery agrees that there is nothing in the order to view by itself which imposed this liability on the purchaser.

Again, Messrs. Fullwoods seem quite to misunderstand the position, because they seem to have suggested that they were entitled, in giving the order to view, to make terms, giving the order to view as consideration for the payment of commission to them. That again would be quite inconsistent with their duty to the vendor, which is to give an order to view to every probable purchaser, and not to refuse an order to view because they cannot get any agreement to pay them commission. Again, Messrs. Fullwoods seem quite to misunderstand their position as agents in trying to get a double commission. With regard to the phrase used in

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the letter, "We shall be glad to know your decision in due course," that is, after giving the names of a number of hotels, "and if business is done we shall act for you at the usual brokerage," in my view that is quite ambiguous. It may be an offer, "If you want us to act for you we shall be prepared to, if you pay the usual brokerage," but there is nothing to make it a proposal for a contract which is necessarily accepted by using the order to view which it is the agent's duty to his vendor to give without any conditions at all. If the plaintiff or any public house broker wants to get two commissions, he must fulfil the two conditions of the law by making a full disclosure to each party of the exact nature of his interest before he makes the alleged agreement, and, if he gets a second commission, by obtaining the consent of each party. It is not enough to say that it is the usual or customary brokerage, because the law has held that a custom to the effect that an agent shall have double brokerage without informing his principal is unreasonable, and shall not be enforced; and anybody who does want to get double commission, where he has two different interests in himself which may clash, must fulfil to the strictest extent the requirements of the law.

This I understand to be the substance of the Divisional Court's judgment, and, while not disagreeing with it, there are one or two phrases in it that I do disagree with. I rest my judgment on the ground that an agent who wants to make two contracts for double commission must do so in the clearest possible terms and with the clearest possible information to each of his principals what he is doing, otherwise he cannot sue under an alleged agreement.

On those grounds I think the appeal must be dismissed, and I have stated them because my views are not quite the same as those of the Divisional Court.

SARGANT L.J. I am of the same opinion. Mr. Emery has from time to time in the course of the argument referred to an alleged custom in the trade. It has been said that the matter could not be based on custom, that there was not any such evidence of custom as would be sufficient to establish

that, and the learned judge himself has not relied in any way on custom. Therefore I think custom may be put entirely out of the question.

That being so, the claim of the plaintiff seems to me to depend simply and solely on that final paragraph in the letter which accompanied the large number of orders to view which he gave to the defendant. That sentence, "We shall be glad to know your decision in due course, and if business is done we shall act for you at the usual brokerage," seems to me to be an ambiguous sentence. It may be the expression of an offer to act for the purchaser at the usual brokerage, or a statement that they will so act, or it may be that it would be necessary, in order for the plaintiff to establish his claim, to show that it was a statement that this order to view was merely given to him on the condition that he agreed to pay them a second commission. With regard to that interpretation, I do not think the plaintiff can insist upon that, because if that is the interpretation, he is seeking to impose an onerous condition on the purchaser which might very well prevent the purchaser ever taking advantage of the order to view; and to impose such a condition would be in flagrant violation of his duty to the vendor, which is to bring along any purchaser who can be found on the terms of the vendor paying the plaintiff the agreed commission. It would be entirely wrong and improper for the plaintiff, without the fullest prior sanction on the part of the vendor, to seek to impose upon the purchaser a condition which might have the effect of stalling off a purchaser and preventing the plaintiff from securing for the vendor such a purchaser as would be acceptable to the vendor.

In my judgment, therefore, the plaintiff has failed to prove that there was any contract between him and the defendant entitling the plaintiff to claim this second commission from the defendant in addition to the commission he has already been paid by the vendor.

Appeal dismissed.

Solicitor for the appellant: *W. H. Lane.*

Solicitors for the respondent: *Mockridge & Co.*

R. M.

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July 5, 6, 15.

[IN THE COURT OF APPEAL.]

REES ROTURBO DEVELOPMENT SYNDICATE, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

SAME *v.* DUCKER. (1)

Revenue—Sale of capital Assets—Patents—Income Tax—Excess Profits Duty —Liability to Assessment—Commissioners' Finding insufficient—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D.*

The appellant company was assessed to income tax and excess profits duty upon a sum of 15,898*l.*, representing the share of the company of the sale price of the patent rights in the United States of America of the group of patents relating to centrifugal, turbine and similar pumps, which it was the purpose of the company to acquire and turn to account by granting licences or by sale. The company claimed that the sum in question was a capital asset and not a profit of its circulating capital. The Special Commissioners found that the profits on sale of the patent arose in the course of the company's business and were chargeable to the tax and duty :—

Held, by Lord Hanworth M.R. and Sargant L.J. (Scrutton L.J. dissenting), that the finding of the Commissioners was not a finding that the profit was realized as part of the company's ordinary trading, and was not in itself a sufficient finding of fact ; and that the sale of the patent rights was the transmutation of a capital asset into money and not a profit of circulating capital.

Decision of Rowlatt J. reversed.

Collins v. *Firth-Brearley Stainless Steel Syndicate, Ld.* (1925) 9 Tax Cas. 520 ; 133 L. T. 616 applied.

APPEALS from decisions of Rowlatt J. confirming the decisions of the Special Commissioners that the appellant company was liable to income tax and excess profits duty upon 15,898*l.*

The company contended that the sum in question was not liable to either tax or duty, because it represented the share of the company in the sale price of the patent rights in the United States of America of the group of patents relating to centrifugal, turbine, and similar pumps, which it was the purpose of the company to acquire and turn to account by licences or by sale. The other patents of the group related to devices subsidiary to the main one, and were dependent for their purpose and use upon the central invention, the fundamental basis of which was the Roturbo principle.

(1) See footnote on p. 498 above.

The company claimed that the 15,898*l.* was a capital asset and not a profit of its circulating capital. The Crown claimed that it was a receipt and profit made in the course of carrying on the ordinary business of the company, and so chargeable to the tax and duty.

Further details of the dealings by the company with their patents appear in the following judgment of Scrutton L.J.

The Commissioners heard the cases in December, 1924, but delayed their decision until Rowlatt J.'s judgment in the similar case of *Collins* v. *Firth-Brearley Stainless Steel Syndicate, Ld.* (1), in which Rowlatt J. held, reversing the decision of the General Commissioners, that the sale of that company's patents was made in the ordinary course of the business of the company, and that the difference between the sale moneys and the cost of the patents to the company was assessable. That judgment, which was subsequently reversed by the Court of Appeal (1), was delivered on March 2, 1925, and on March 18 of the same year the Commissioners gave their decision in the present cases, holding that the profits on sale of the patents arose in the course of the appellant company's business and were chargeable to the tax and duty. That was not a finding that the profit was realized as part of its ordinary trading, but Rowlatt J. so interpreted it in his judgment, and confirmed the decision of the Special Commissioners.

The company appealed. The appeal was heard on July 5 and 6, 1927.

Latter K.C. and *J. H. Bowe* for the appellant company. On the facts and on the powers and objects of the company this case is on all fours with the *Firth-Brearley* case. (1) The test to be applied by the Court is, what was the scope of the company's business; was the buying and selling of patents part of its business? The true view of this company is that its business was that of developing this patent. The Crown has never addressed its mind to the real point in issue—namely, whether the company has been peddling away its

(1) (1925) 9 Tax Cas. 520; 133 L. T. 616.

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patents. The company has only one patent for development and from which to acquire income from royalties. The difference between fixed and circulating capital was discussed by Lord Young in *Assets Co.* v. *Forbes.* (1)

The Commissioners have come to a decision which is not sufficient to determine any question, and they have not determined the right point in this case, but the Court will decide the right one: *British Insulated and Helsby Cables* v. *Atherton.* (2)

[They also referred to *Great Western Ry. Co.* v. *Bater* (3); *American Thread Co.* v. *Joyce* (4); *Lysaght* v. *Inland Revenue Commissioners.* (5)]

Sir Thomas Inskip S.-G. and *R. P. Hills* for the respondents. There is no authority in which the question whether appreciation in the value of capital is subject to tax has been raised, but it is clear that the Income Tax Acts do not tax capital as such: *Secretary of State for India* v. *Scoble.* (6) A patent is a right to exclude others from infringing, and under an exclusive licence the patentee makes a grant subject to the payment of royalties, which he can withdraw, but as soon as the stage is reached where the grant amounts to the carrying on of an industry the sum received is not distinguishable from the royalties under a licence. Where there are a dozen patents based on a master patent, and some are sold in one country and licences granted in another, the Revenue authorities may begin to differentiate between commutation of capital and receipt of royalties. Where a sale is merely a commutation of capital then the proceeds are not taxable, but where it is a realization of profit then they are taxable.

The facts show that there was a development of the value of these patents; that was the company's business, and it sold the patents, although it may not have wanted to do so, but that is none the less a business involving profits. It is a question of fact for the Commissioners, and their findings must be considered: *Currie* v. *Inland Revenue*

(1) (1897) 3 Tax Cas. 542, 548.
(2) [1926] A. C. 205, 213.
(3) [1922] 2 A. C. 1.
(4) (1912) 6 Tax Cas. 1; (1913) Ibid. 163.
(5) [1927] 2 K. B. 55.
(6) [1903] A. C. 299.

Commissioners (1); *Cape Brandy* case. (2) They intended to find it as a fact, and their findings cannot be disturbed.

Latter K.C. in reply. The Commissioners have not addressed themselves to the real question which they had to decide. This company does not buy and sell patents: *Collins* case (3); *Californian Copper Syndicate* v. *Harris* (4); *Beynon & Co.* v. *Ogg* (5); *Tebrau (Johore) Rubber Syndicate, Ld.* v. *Farmer*. (6) It has only sold when compelled to do so. The Commissioners mistook the law.

Cur. adv. vult.

July 15. LORD HANWORTH M.R. These two appeals are from judgments of Rowlatt J. dated May 20, whereby he confirmed the decisions of the Commissioners, that the above named company was liable to pay income tax and excess profits duty upon a sum of 15,898*l.* The details of the figures are not in dispute and the full facts are stated in the cases and the judgment of Rowlatt J. For the purpose of this judgment it is enough to say that the company contends that the above sum was not liable to income tax or to excess profits duty, because it represents the company's share of the sale price of the patent rights in the United States of America of the group of patents relating to centrifugal turbine and similar pumps which it was the purpose of the company to acquire and to turn to account by granting licences or by sale. This is the sole question raised in the case, although the dealings by the company in other directions are stated for the purpose of giving full information upon its activities. To avoid any misconception, I say that in my judgment the group of patents which were acquired by the company may be treated as the one patent which the company was formed originally to acquire. The other patents which have been added to the original one relate to devices subsidiary to the main one, and are dependent for their purpose and use upon the

(1) [1921] 2 K. B. 332.
(2) [1921] 2 K. B. 403.
(3) 9 Tax Cas. 520; 133 L. T. 616.
(4) (1904) 5 Tax Cas. 159; 41 S. L. R. 691.
(5) (1918) 7 Tax Cas. 125.
(6) (1910) 5 Tax Cas. 658.

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central invention, the fundamental basis of which was what is called the Roturbo principle.

It is claimed on behalf of the company that what they have disposed of, in return for which they have received the 15,898*l.*, was a capital asset—that the transaction was a realization of a part of their capital assets, and not a profit of their circulating capital. The Revenue authorities contended that it was a receipt and profit made in the course of carrying on the ordinary business of the company, and so chargeable to the tax and duty. Thus the question, which is the same in both cases, is the difficult one of deciding whether a profit realized belongs to the capital or profit and loss account.

The cases were heard in December, 1924, but the Commissioners delayed their decision until a judgment was delivered by Rowlatt J. in the case of *Collins* v. *Firth-Brearley Stainless Steel Syndicate, Ld.* (1), which involved a similar question. That judgment was delivered by Rowlatt J. on March 2, 1925, and the Commissioners then gave their decision in the present cases on March 18, holding: "That the profits on sale of patents arose in the course of the appellant company's business and were chargeable to income tax and excess profits duty." They followed the question put and answered affirmatively by Rowlatt J. in his judgment in the *Firth-Brearley* case (1)—namely, whether the company benefited by this appreciation in the course of its trade—with the same result as decided by Rowlatt J. in the *Firth-Brearley* case (1), that the syndicate was liable to the tax. That question so answered in the *Firth-Brearley* case (1) was held in this Court on June 25, 1925, not to have concluded the matter. The finding of the Commissioners in the present cases was not that the profit was realized as part of its ordinary trading, although it was so interpreted by Rowlatt J. in his judgment now under appeal.

In the *Firth-Brearley* case (1) in this Court Atkin L.J. pointed out that it was necessary not only to determine that the syndicate carried on a trade, but also what was the scope

(1) 9 Tax Cas. 520, 573; 133 L. T. 616.

of the trade: "For that purpose I think in order to examine the facts you must look at what the company purported to do, and also at what it did in fact." Finally, upon an examination of the findings of the Commissioners, the Court of Appeal held that they had intended to find that upon the sale of the patent there was a transmutation of a capital asset from the form of a patent to a sum of money, and that upon that finding the Firth-Brearley Syndicate was not liable to income tax.

The present cases, therefore, come before this Court with a finding by the Commissioners which in itself is not sufficient. The scope of the trade in the course of which the profits on sale of patents arose is not examined or stated. Rowlatt J. regretfully felt that he could not disturb the finding of the Commissioners, which he interpreted as meaning that the profits arose out of the syndicate's trading and in the course of their seeking the objects of their ordinary business. It is unfortunate, as the learned judge observes, that the question decided in the *Firth-Brearley* case (1) and presented in the one before us involves such a nice examination of the language used, but it is not possible to do justice to the issues raised, and the decisions given, without it.

Two points arise for this Court to determine: (1.) Is the question raised by the appeal one of fact upon which the decision of the Commissioners is final or one of law? (2.) Have the Commissioners rightly directed themselves in applying the law to the facts? It is not necessary to go over again all the cases in which this problem of fact or law has been discussed. They are referred to in the decision of this Court in *Currie* v. *Commissioners of Inland Revenue* (2), particularly in the judgment of Scrutton L.J., who quotes the observation of Lord Parker in *Farmer* v. *Cotton's Trustees* (3), saying: "That the views from time to time expressed in this House have been far from unanimous." It is useful, however, to observe that in *Currie's* case (4) the question for the Court was whether a man was carrying on a profession. That was held to be one of fact. On the other side, in the

(1) 9 Tax Cas. 520; 133 L. T. 616.
(2) [1921] 2 K. B. 339.
(3) [1915] A. C. 922, 932.
(4) [1921] 2 K. B. 332.

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Inland Revenue Commissioners v. *Korean Syndicate* (1), which was decided in this Court, and two members of it were those who had decided *Currie's* case (2), it was held that the Commissioners had misdirected themselves on a matter of law—namely, the true interpretation of an agreement and the memorandum and articles of association of the company. Thus the Court felt able to reverse the decision of the Commissioners, which had been upheld by Rowlatt J. I have come to the conclusion that the later decision applies to the present case. The circumstances under which the decision of the Commissioners was given confirm me in this view, for not only had the Commissioners to consider the memorandum and articles of association of the syndicate and the agreements made with the Manistee company, dated March 15, 1912, and January, 1917, but avowedly they waited for the guidance to be derived from the judgment of Rowlatt J. in the *Firth-Brearley* case (3), a judgment which was afterwards reversed.

Dealing with the case, therefore, as one open to review in this Court, it appears that the asset of the syndicate, which was incorporated in 1906, was this group of Roturbo patents with the rights which accrued to them in foreign countries under international conventions. The facts as to the syndicate's business for a succession of years are stated in para. 11 of the Case. When the option to purchase the American rights was exercised by the Manistee company in 1917, the syndicate marked the distinction between the royalties paid to it for the user of the patent during 1917 and the sum received for the sale of the American rights by bringing the former into its profit and loss account, and deducting the latter from the value of the patents in its balance sheet in 1918. In 1922 the syndicate reduced its paid up capital under s. 40 of the Companies (Consolidation) Act, 1908. The syndicate was not trading in buying and selling patents generally. It had secured these particular patents and patent rights which formed the totality of its assets. It was proved by evidence, which the Commissioners

(1) [1921] 3 K. B. 258. (2) [1921] 2 K. B. 332.
(3) 9 Tax Cas. 520; 133 L. T. 616.

accepted (see para. 12), that the syndicate had never originated offers to sell the foreign patents.

If the Commissioners had had an opportunity of considering the judgment of this Court in the *Firth-Brearley* case (1), in my judgment they would, and ought to, have come to the conclusion that the sale of these U. S. A. patent rights was the transmutation of a capital asset into money. It was an out and out disposal of a right which, up to the date of the sale, enhanced the capital assets, and upon its transfer to the Manistee company operated as a deduction from them. It was a substitution of one form of fixed capital assets for another, not a profit of circulating capital.

In the *Gloucester Wagon* case (2) Lord Dunedin held that the selling of the wagons was an incident of buying and selling in the ordinary course of the business of the company, for it was an integral part of the company's business to deal in and sell wagons. The business was of a different nature here.

Holding, as I do, that the decisions of the Commissioners in this case are open to review in this Court, I have come to the conclusion, which I gather that Rowlatt J. would have desired to reach, that these appeals must be allowed and this sum of 15,898*l.* must be treated as a capital asset.

The appeals will be allowed with costs and the assessments discharged.

SCRUTTON L.J. These two appeals by the Rees Roturbo Syndicate, Ld., one in respect of income tax, one in respect of excess profits duty, raised the same point, whether the syndicate were liable to taxation on the result of certain transactions in respect of their patents. The Special Commissioners held that the results were profits in the sale of patents arising in the course of the syndicate's business, and as such were liable to taxation. Rowlatt J. declined to interfere with what he considered to be a finding of fact by the Commissioners, and the syndicate appeal.

The case is complicated by the fact that this decision of the Special Commissioners was pronounced after Rowlatt J.

(1) 9 Tax Cas. 520; 133 L. T. 616 (2) [1925] A. C. 469.

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had reversed a previous decision of theirs in a somewhat similar case, but before the decision of the learned judge in that previous case had been reversed by the Court of Appeal. Rowlatt J.'s decision in the present case was, however, given with full knowledge of the decision of the Court of Appeal in the previous case.

I deal with the facts of the present case first. The syndicate had a very large interest in a series of patents relating to centrifugal pumps and condensers both in England and foreign countries. As a company it was formed to acquire these patents, to manufacture them and to "sell, dispose of, turn to account, grant rights and privileges in respect of all or any part of the property and rights of the company." The company desired if possible to exploit these patents by granting manufacturing licences in consideration of royalties, and to retain the ownership of the patents. But it was found that some foreign manufacturers would not agree to take a licence on payment of royalties, even an exclusive licence, unless they were also given an option to purchase the patents. Under these circumstances, besides a number of royalty licences in varying countries, these transactions are mentioned in the case. (1.) An exclusive licence to the Manistee company for the United States and Canada in consideration of a cash payment of 10,000*l.* and royalties of 10 per cent. on the selling price, with a guaranteed minimum, coupled with an option exercisable within fixed dates to purchase the United States and Canadian patents for a lump sum. The Manistee company paid the 10,000*l.*, but not the minimum royalties, and ultimately another agreement was made by which the Manistee company was excused royalties up to January 1, 1917; and its option was changed into one to purchase the United States patents only for a sum of 26,500*l.* The Manistee company paid royalties for 1917, and then exercised its option, and 15,898*l.* net was received by the syndicate, and written by them off the value of the patents. This appears to be the sum in dispute in this case. I find it difficult to understand how part of this complicated

transaction is in the course of business and part not. (2.) In 1918 an agreement was made with a Canadian company, by which an exclusive licence was granted to them to manufacture and sell Roturbo pumps within the Dominion of Canada in consideration of a payment of $5000; a royalty on selling price with a guaranteed minimum, and a provision that when the royalties came to $90,000 all royalties should cease and the Canadian patents should be transferred to the Canadian company. (3.) By an agreement of 1919 an exclusive licence was granted to a French company to manufacture and sell in France in consideration of 130,000 francs paid down, and royalties to be reduced when the royalties reached a certain amount.

In para. 21 of the Case it is stated that the syndicate, while not admitting liability in respect of cases (2.) and (3.), did not object to the sums received under them being included in the assessment. The practical difference between an exclusive licence for a district and an assignment of the patent for that district is very small. The licensor cannot, having granted an exclusive licence, make any money out of the patent in the district of the licence, except from the licensee under the licence. He does retain to himself the right to sue for infringements, which would pass to the assignee under an assignment of the patent; but in agreements (2.) and (3.) he binds himself to sue infringers in the licensed districts at his own expense. It does not appear to be disputed that the royalties would be proper subject-matter of taxation, and it follows in the Canadian case that when, the royalties having reached $90,000, the patents were assigned to the licensee, the whole amount of the consideration for the assignment would have paid tax. The syndicate have not objected to the lump sums in cases (2.) and (3.) being included in the taxation, and no question is apparently raised about the royalties or first lump sum in the Manistee case. The syndicate have done sufficiently well in exploiting the patents to return 95 per cent. of their capital out of accumulated profits, which must all have been taxed as profits. The line between receipts which are not taxable as being the result

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of sale of capital assets, and receipts which, though receipts of sale, are taxable as profits of trade, is stated by Lord Dunedin in the Privy Council in *Commissioner of Taxes* v. *Melbourne Trust, Ld.* (1), as follows: "Their Lordships think that the principle is correctly stated in the Scottish case quoted: *California Copper Syndicate* v. *Harris.* (2) 'It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842, assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.' In the present case the whole object of the company was to hold and nurse the securities it held, and to sell them at a profit when convenient occasion presented itself. Their Lordships therefore come to the conclusion that there is ample evidence here that the company is a trading company and that the surplus realized by it by selling the assets at enhanced prices is a surplus which is taxable as profit." This case was followed by the Privy Council in *Rex* v. *Anderson Logging Co.* (3) Illustrations of the two classes of cases as regards sale of land may be found in *Hudson's Bay Co.* v. *Stevens* (4) (price of land not taxable) and *Thew* v. *South-West Africa Co.* (5) (price taxable as proceeds of trade). Cases of taxation on the profits of realization by sale of one and the only asset will be found in *Martin* v. *Lowry* (6) and the *Cape Brandy Syndicate* v. *Inland Revenue Commissioners.* (7) This being the question to be decided, the Commissioners heard arguments from the syndicate that the sum in dispute was a realization of capital assets, and from the Crown that it was a receipt of the company's business, and decided that "the profits

(1) [1914] A. C. 1001, 1010.
(2) 41 S. L. R. 691; 5 Tax Cas. 159.
(3) [1926] A. C. 140.
(4) (1909) 5 Tax Cas. 424.
(5) (1924) 9 Tax Cas. 141.
(6) [1927] A. C. 312.
(7) [1921] 2 K. B. 403.

on sale of patents arose in the course of the syndicate's business." If this is a finding of fact, it is unappealable if there was evidence on which the finding could be made, even if the Court would not have made such a finding. If it includes a finding of law, it is appealable on the law.

In my view it is impossible to reconcile the various statements of high authorities on the division between fact which is unappealable and law which is appealable. One may compare the view of Lord Parker in *Farmer* v. *Cotton's Trustees* (1) and Lord Wrenbury in *Great Western Ry. Co.* v. *Bater* (2), which I think would make every finding of fact appealable on the ground that it was a question whether the Commissioners had rightly construed the statute or law which used the word in which they described the "fact," with the views of the House of Lords in *American Thread Co.* v. *Joyce* (3), affirming the judgment of Hamilton J., and in Usher's *Wiltshire Brewery, Ld.* v. *Bruce* (4), negativing the view of Sir Samuel Evans that the question was one of law. I have myself twice expressed my views on the subject at some length, first in *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (5), a decision which has several times been cited with approval in this Court and the House of Lords, and secondly, in *Currie* v. *Inland Revenue Commissioners.* (6) In my view, the point at which sales of assets resulting in a profit are of such a number and nature as to constitute a trade or business, or the point when a sale of an asset is so connected with a trade carried on that profits received from it are profits of a trade, is a question of degree and of fact. How many sales of pictures will make a man a picture dealer is a question of degree. I agree with the view of Atkin L.J. in *Cooper* v. *Stubbs* (7), that questions of degree are questions of fact, and that whether a trade is being carried on is a question of degree and fact.

Looking at this case alone I think there was evidence on

(1) [1915] A. C. 932.
(2) [1922] 2 A. C. 1.
(3) 6 Tax Cas. 1; Ibid. 163; 106 L. T. 171; 108 L. T. 353.
(4) [1915] A. C. 433, 465.
(5) [1914] 3 K. B. 674.
(6) [1921] 2 K. B. 332.
(7) [1925] 2 K. B. 753, 772.

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which the Commissioners could find that these profits arose in the course of a trade or business. The syndicate were making profits out of the manufacture of their pumps largely by granting licences in exchange for royalties. They found difficulties in getting agreements to pay royalties unless they would grant options to purchase, or agreements to assign when royalties reached a certain amount. I find it impossible to say that there was no evidence on which the Commissioners could find that these transactions were part of, incidental to and arose out of the appellants' trade or business. Indeed the appellants did not object to cases (2.) and (3.) and the royalties under case (1.) being included in the assessment. So far on the case under appeal.

There remains the question how far the present case is affected by the proceedings in the *Firth-Brearley* case. (1) In that case the company had patents for the manufacture of stainless steel, and granted licences for their use. Three transactions were stated in the case. (1.) An agreement by which the United States patent was sold in consideration of 550 shares in the purchasing company. The selling company here exchanged the patent under which they could receive royalties for shares in a company which itself would pay dividends out of the sums made by exercising, or licensing the use of the patent. This certainly looks like the exchange of one capital asset for another. (2.) An agreement for the sale of a Japanese patent for a price, payable by ten yearly instalments, and for a fixed royalty per year for the life of the patent. (3.) An agreement whereby a French patent was assigned in consideration of a royalty per pound of all stainless steel dealt with under the patent. These last two cases are similar to cases (2.) and (3.) of the present case, on which the present respondents submitted to be taxed.

The General Commissioners for one of the divisions of Yorkshire heard similar arguments to those in the present case, and decided that "the amounts realised were an appreciation of capital and not taxable profits." Rowlatt J. reversed their decision. He has explained in his judgment

(1) 9 Tax Cas. 520; 133 L. T. 616.

in the present case that he did so under the impression that they had only found an appreciation of capital in the course of trade, and that if he had understood that they intended to find an appreciation of a capital asset not in the course of trade, he would not have reversed their decision. However that may be, the Court of Appeal reversed Rowlatt J.'s judgment and restored the decision of the Commissioners. The ground of their opinion appears to be that it was a finding of fact with evidence justifying the decision, though there was evidence on which an opposite finding might be arrived at. Lord Hanworth at the end of his judgment, Warrington L.J., and Atkin L.J. at the beginning of his judgment, all treat the finding as one of fact, with evidence to support it, with which the judge had no right to interfere, he not being the judge of fact.

I approach the present case in the same way; in my view there is here a finding of fact, with evidence to support it, and no misdirection in law. It would have been possible in each case to come to a decision the other way; this is always so when the question is one of degree judged of by different bodies of Commissioners. The Special Commissioners are at least as competent to decide questions of fact and appreciate the law as the Commissioners of this Division of Yorkshire; one might perhaps go further with safety. In my view Rowlatt J.'s refusal to interfere with the decision of the Commissioners, even after reading the decision of this Court in the *Firth-Brearley* case (1) was justified, and the appeal must be dismissed.

SARGANT L.J. In the first case—namely, that as to income tax—I think that Mr. Latter was right in his contention that the decision of the Special Commissioners must be interpreted in the light of the learned judge's decision in the analogous *Firth-Brearley* case. (1) The appeal in that case had been decided by the learned judge on March 2, 1925, while the decision in the present case was given by the Special Commissioners on March 18, 1925, having been held over by them

(1) 9 Tax Cas. 520; 133 L. T. 616.

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since the argument before them on December 9, 1924. It is fairly clear therefore from these dates, as is confirmed by the internal evidence of the decision itself in the present case, that the Special Commissioners have taken for their guide the observations of the learned judge in his judgment in the *Firth-Brearley* case. (1)

Now in that case the Commissioners had decided that the sums received by the company on the sale of their patents in Japan and the United States of America were an appreciation of capital and not assessable profits. But the learned judge reversed their decision, because (as he says in the present case) he misunderstood their finding, and thought that they did not mean that there had been an appreciation of a capital asset, but that they meant that the appreciation had occurred in the course of "trade which it was the object of the trade to secure." Unfortunately, however, for the decision of the present case, the learned judge in the language of his decision in the *Firth-Brearley* case (1) did not make it clear that his judgment was based upon the supposition that the appreciation was in the course of "trade which it was the object of the trade to secure," but used language which was much more general—namely, that any appreciation in the course of the company's trade would have been sufficient to involve liability to income tax.

With that judgment before them the Special Commissioners here, while stating correctly the contention on behalf of the company that the sale of the patents in the United States of America was a sale of part of their capital assets (i.e., of assets representing fixed capital and not circulating capital), state the contention of the Crown in terms which fall short of being the contrary of that contention, but satisfy the less definite language of the judgment of Rowlatt J. in the *Firth-Brearley* case (1)—namely, that the sum received on the sale was "a receipt of the appellant company's business and so assessable to income tax." And in the same way the decision of the Commissioners is worded in language equally wanting in the necessary precision—namely, that

(1) 9 Tax Cas. 520; 133 L. T. 616.

"the profits on sale of patents arose in the course of the appellants' business and were chargeable to income tax and excess profits duty."

In this state of things, the first question that arises is: What is the right interpretation to be put upon the finding of the Commissioners in the present case? The learned judge has held that it amounted to a direct negativing of the contention of the company, and to an assertion that the profit arose "in the course of the appellants' business, not because they were getting rid of a capital asset and putting an end to it, but because it was in the course of their business to sell the patents." With all respect to him, I cannot take that view. In my opinion the Commissioners carefully abstained from directly negativing the company's contention, and found in favour of the Crown enough and no more than enough to involve liability to income tax on the basis of the incomplete test stated by the learned judge in his decision in the *Firth-Brearley* case. (1)

I arrive at this conclusion on the language used by the Commissioners in stating the contention of the Crown and their own finding. But the conclusion is immensely strengthened by a consideration of the specific facts found by the Commissioners in the previous paragraphs of the case and particularly in paras. 10, 11 and 12. It appears that the appellant company, so far from making it their business or part of their business to attempt to sell their foreign patents or any of them, always endeavoured to avoid any such sale, and that the sale now in question is the only sale the company have ever in fact made. The specific facts found point unmistakably to the company's patents having constituted fixed assets or capital, as distinguished from assets or capital circulating in the course of the company's business, and so resulting in a profit or loss attributable to income. And it is, in my judgment, inadmissible to attribute to the somewhat ambiguous and indefinite words of the general conclusion in para. 24 of the case a meaning which would be directly in the teeth of the facts specifically found in the

(1) 9 Tax Cas. 520; 133 L. T. 616.

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preceding paragraphs. Indeed, if the conclusion in para. 24 has the meaning attributed to it by the learned judge, there was not, in my judgment, any evidence on which the Commissioners were entitled to come to this conclusion.

Further, I do not consider that the decision of the Commissioners in clause 24 (for that is what they call it) was—or was intended by them to be—a finding of fact. I think it was a decision as to the law resulting from the facts previously found by them and stated in detail in the preceding paragraphs of the case. In my judgment that decision as to the law was wrong, and should on the specific facts found by the Commissioners have been the other way; and the facts so specifically found and stated are in my opinion sufficient, to entitle this Court to deal with and answer the question raised by para. 21 of the case.

On these facts, which are practically on all fours with those in the *Firth-Brearley* case (1), or so far as they differ are more strongly in favour of the taxpayer, this question should be answered in the negative, since the assets sold were obviously part of the fixed capital of the company and not part of its circulating capital. And I think therefore that the decision of the learned judge to the contrary should be reversed.

I may add that this decision does not in my view prejudice such claim, if any, as the Crown may have to income tax in respect of the years in which the company earned the royalties to the extent of 13,500*l.*, which were ultimately included in the purchase price of 26,000*l.* The reversal of the decision as to income tax of course involves a reversal of the corresponding decision as to excess profits duty. It has throughout been agreed that the two claims by the Crown rest on the same foundation.

Appeal allowed. (2)

Solicitors for appellants: *Sharpe, Pritchard & Co., for Underhill, Neve & Co., Wolverhampton.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) 9 Tax Cas. 520; 133 L. T. 616.

(2) Reversed in H. L. February 14, 1928. The decision will be reported in due course.

R. M.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D.
1927
April 6, 7.
C. A.
July 20, 21.

THE KING *v.* COMMISSIONERS OF CUSTOMS AND EXCISE.

Ex parte PEGLER. (1)

Revenue—Licensed Premises—"Tied" House—Increased Duty on Licences imposed by Finance (1909–10) *Act*, 1910—*Tenancy commencing after passing of Act—Right of Lessee to recover Portion of increased Duty from Landlord —"Is bound"—Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 46.

Sect. 46 of the Finance (1909–10) Act, 1910, which confers on a lessee of "tied" licensed premises the right to recover from the persons from whom he "is bound" to obtain his liquor a proportion of the increased licence duty imposed by s. 43 of the Act, does not apply to tenancies entered into after the passing of the Act:—

So *held* by Lord Hanworth M.R. and Sargant L.J. (Scrutton L.J. dissenting), affirming the decision of the Divisional Court (Avory and Talbot JJ.; Swift J. dissenting).

RULE NISI for mandamus.

The applicant, Frederick Pegler, was the licensee of the City Arms public-house, Bell Lane, Gloucester. In 1911 the then landlords, Arnold Perrett & Co., Ld., first granted him a lease of the house for twelve months and thereafter from year to year at a rent to be payable "without any deduction except for landlord's property tax." The applicant covenanted to purchase all his liquor from the landlords, the house thus being a "tied" house. That lease was replaced by others, one, dated March 5, 1920, being that now in force, which contained the same covenants, the present landlords being the Cheltenham Original Brewery Company, Ld. On April 29, 1910, and therefore before the grant of the first lease, the Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), came into force. By s. 43 certain increased duties on liquor licences were imposed, and s. 46 provided: "Where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating

(1) See footnote on p. 498 above.

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liquor from any person or persons, the licence holder shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from or deduct from any sum due to any such person so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon, or in default of agreement determined by the commissioners to be proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit obtained by such person by reason of any such covenant, agreement, undertaking, or obligation as aforesaid." In 1926 the applicant applied to the respondents, the Commissioners of Customs and Excise, to determine under the above section the proportions of the duty to be paid by him and by the landlords. The commissioners refused to do so on the express ground that, as the applicant had only become the licence holder since the passing of the Act, s. 46 did not apply.

The applicant then obtained this rule.

Sir T. Inskip S.-G. and *Bowstead* showed cause. Sect. 46 of the Finance (1909–10) Act, 1910, does not apply to the agreement in question, because it was entered into after the passing of the Act. The words of the section "so much of any increase of the duty payable in respect of his licence occasioned by this Act" are not apt to describe generally the increase of duty effected, but only such increase as was payable by the licence holder under the terms of his lease. The comparison is between the amount he had agreed to pay before, and the amount he would have to pay after, the Act. Without the aid of the legislature the whole of the burden of the increase would fall on the licensee. But the case of the licensee making his agreement after the passing of the Act would be different. He would, on entering into the agreement of tenancy, be aware of the provisions of the Act and could make his agreement accordingly, and the assistance of s. 46 is unnecessary. The words "is bound" refer grammatically to the time of the passing of the Act. The applicant relies on the case of *Wooler* v. *North Eastern*

Breweries (1), but that case is not in point, for it is clear that the section there dealt with—s. 3, sub-s. 3, of the Licensing Act, 1904 (4 Edw. 7, c. 23)—substitutes a statutory agreement for the previously existing one.

[The Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 2, was also referred to.]

Mitchell Banks K.C., *Croom-Johnson K.C.* and *Gordon Clark* for the brewers.

Norman Birkett K.C. and *Roland Burrows* in support. In order that s. 46 should have the meaning contended for by the revenue authorities, it would be necessary to introduce words so as to make it read "Where the licence holder is bound by any covenant at the passing of this Act." Parliament, if that were their intention, could easily have so expressed it, and the necessity of doing so would have occurred to them. When they did determine to define the operation of an Act, they clearly indicated their intention, as in s. 2 of the Finance Act, 1912, when dealing with free houses. It is clear that the words "is bound" in s. 46 do not in themselves refer to the past only. Parliament cannot have intended to limit the application of s. 46 as suggested in view of the ease with which that limitation could be rendered nugatory, for brewers on the passing of the Act could at once have terminated all agreements with their licensee tenants, which are usually for short terms, and then have made fresh agreements to which the section, ex hypothesi, would not apply. In *Watney, Combe, Reid & Co.* v. *Berners* (2), in which s. 46 was discussed both in the Court of Appeal (3) and the House of Lords (2), it was never suggested that it only applied to agreements made before the passing of the Act. The object of the legislature was to make the brewers bear their share of the increased duties, and there seems to be no reason why the legislature should make them do so in the case of agreements made before the Act only.

Cur. adv. vult.

(1) [1910] 1 K. B. 247. (2) [1915] A. C. 885.
(3) [1914] 3 K. B. 288.

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1927. April 7. SWIFT J. In this case I have the misfortune to differ from the majority of the Court, and I need hardly say with what diffidence I express my own opinion; but I hold a strong view upon this matter and I think it my duty to give my reasons for the conclusion at which I have arrived.

In this case Frederick Pegler, the licensee of the City Arms, Bell Lane, Gloucester, has obtained a rule calling upon the Commissioners of Customs and Excise "to show cause why a writ of mandamus should not issue directed to them commanding them to hear and determine pursuant to the statutes in that behalf the matter of an application by Frederick Pegler to determine the proportion of the increased duty payable in respect of his licence of the City Arms, Bell Lane, Gloucester, occasioned by s. 46 of the Finance (1909–10) Act, 1910." The facts are, that on August 31, 1911, Messrs. Arnold Perrett & Co., Ld., granted a lease to Mr. Pegler of the public-house the City Arms Inn, Bell Lane, Gloucester, for twelve months from September 29, 1911, and thereafter from year to year, at a yearly rental of 40*l.* "to be paid without any deduction except for landlord's property tax by equal quarterly payments." The lease contained covenants by the tenant (*a*) "to pay unto the landlords the yearly rent hereinbefore reserved at the times and in the manner aforesaid without any deduction (except as aforesaid) and will also at all times during the said tenancy pay and discharge all rates tithes taxes charges assessments duties and outgoings whatsoever whether Parliamentary parochial local or of any other description which are now or may at any time hereafter be assessed charged or imposed upon the said demised premises or the owner or occupier in respect thereof the landlord's property tax alone excepted"; and (*b*) "that the tenant will deal exclusively and directly with the landlords or their successors in business or nominees for any wines spirits cordials liqueurs ales beers porter and cider whether in cask or in bottle cigars and all mineral or aerated waters which he may require for sale under the licence or licences attached to or to be held in respect of the said demised premises." That lease was replaced by others,

one dated March 5, 1920, being the lease now in force, which contains the same covenants. The lease was assigned to the Cheltenham Original Brewery Company, Ld., the present landlords.

On April 29, 1910, before the granting of the first lease, the Finance (1909–10) Act, 1910, came into force. Part II. of that Act deals with duties on liquor licences, and s. 43 and Sch. I. fix the duties of excise to be charged, levied and paid for liquor licences according to a scale therein set out. The effect of that Act was to increase the amount of duty payable in respect of liquor licences, and to prevent that increase falling unfairly, s. 46 provided for its distribution in certain cases amongst the parties interested in the trade done under the licence. That section provides: [His Lordship read the section and continued:] On April 28, 1926, the applicant's solicitors wrote to the Commissioners of Customs and Excise, Lower Thames Street, London, applying to them under s. 46 of the Act, to determine the proportion of the duty payable by the applicant and the proportion payable by the brewers. In reply the commissioners stated that s. 46 did not apply to cases where the agreement, as in the present case, had been made after the passing of the Act. [On the correspondence his Lordship held that the commissioners had refused to determine the proportions.] It is with a view to obtaining an order that they shall so determine, that this application has been made. To that application two answers are made: first, that on the facts of this particular case there is no duty imposed upon the commissioners by s. 46; and, secondly, even if there were, the discretionary writ should not issue, having regard to the facts of this case. With regard to the second of these points, it was contended on behalf of the respondents that there had been great delay in making the application to the commissioners, and that the application, when made, was too vague and indefinite to amount to a request to determine. As to this point, Mr. Birkett, for the applicant, made it clear that he only asks the commissioners to determine the apportionment as for the year 1926. They could have no

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difficulty in doing that. Their duty did not arise, if at all, until the request from the solicitors in their letter of April 28, 1926, and from that date there has certainly been no undue delay in applying for the writ; and looking at the correspondence, I am satisfied that the commissioners knew quite well what they were requested to do, but that they, acting perfectly properly upon advice, pursued in this case their settled policy of consistently and steadfastly refusing to determine under s. 46 of the Act between any licence holder and his landlord the proportion recoverable by the licence holder of any increase in licence duty occasioned by the Act in cases where the licence holder holds the premises under a lease or agreement made after the passing of the Act. I think, therefore, that upon this point the respondents fail and that the real point to be decided is the first one—namely, Does s. 46 apply where the agreement is entered into after the passing of the Act of 1910? If it does, the commissioners are under a duty to determine; they have declined to do so, and the rule should be made absolute. If it does not, they are under no such duty; in declining to consider the matter they have done nothing improper, and the rule should be discharged.

In determining whether or not an agreement made after the passing of the Act is outside the scope of s. 46, the words of that section are, I think, the only matters which can properly be considered. We have to ascertain the intention of the legislature in regard to the matter; but we have to ascertain that intention from the language used. As Lord Haldane said in the case of *Watney, Combe, Reid & Co.* v. *Berners* (1): "The intention must be found in the language finally adopted in the statutes under construction, and in that language alone. No doubt general words may in certain cases properly be interpreted as having a meaning or scope other than the literal or usual meaning. They may be so interpreted where the scheme appearing from the language of the legislature, read in its entirety, points to consistency as requiring the modification of what would be the meaning

(1) [1915] A. C. 885, 891.

apart from any context, or apart from the purpose of the legislation as appearing from the words which the legislature has used, or apart from the general law. In the statutes before us Parliament has thought fit, in the first place, by s. 46 of the Act of 1910, to enable the licence holder of a house in respect of which a tie exists to claim over for a deduction against the person entitled to the benefit of the tie."

Considering the language of this section, I find nothing to limit its operation to agreements made before the Act was passed. It provides: "Where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating liquor from any person or persons." I read those words to mean no more and no less than this: where a person is a tied tenant or the tied occupant of a house, under an obligation to take his liquor from a particular person, then the section becomes operative. Now here we have clearly got a tied tenant, and the licence holder being a tied tenant, the section goes on to provide that he shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt or deduct from any sum due from him to the person to whom he is tied, a proportion of the increase, a proportion which either may be agreed upon between the parties or in default of agreement shall be fixed by the Commissioners of Customs and Excise.

It appears to me that for the respondents' contention to be right in this case, it would be necessary to read into that section some words which are not there: some words such as "Where the licence holder is at the time of the passing of this Act bound by any covenant," that is to say, to read into the words of the description of the person who shall be entitled to recover a portion of the increased duty, the words "who shall be a tied tenant at the time of the passing of this Act and he shall not be entitled to relief unless he is a tied tenant at that time"; or, if the words are not read in there, then in order to support the Solicitor-General's contention, they must be read in after the word "agreement"; and

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then it would read: "A licence holder shall be entitled notwithstanding any agreement made before the passing of this Act to the contrary." But the legislature has not inserted those words, and I find no warrant for adding them. If the legislature had wished to do so, nothing could have been more simple than to have put them in. In the Finance Act, 1912, dealing not with the case of the tied tenant but with the different case of the holder of a lease who was not tied, and desiring to grant relief to such persons, the legislature in s. 2 has given a measure of relief to them, but it has expressly limited it to those leases which were in existence in the year 1910. The fact that in s. 46 this matter is left at large, seems to me to show that there was no intention on the part of the legislature to limit the benefit of the Act which accrues to the person who holds the licence on an agreement under which he buys the liquor, by fixing any particular date. Sect. 2 of the Act of 1912 is relied upon as showing that Parliament thought that s. 46 only applied to agreements made before 1910. I cannot think so. It shows that when dealing with non-tied houses, Parliament thought it proper to relieve only those which had leases before 1910. To my mind it shows nothing as to what they meant to do in 1910 with quite a different class of tenant, with whom they were dealing in quite a different way. And if agreements made after the Act are excluded from the operation of s. 46, the design of the legislature could be easily defeated. Tied tenants, in the vast majority of cases, are tenants on short leases, and there would be nothing easier, when the Act of 1910 passed, than for brewers to have given tied tenants all over the country notice to quit their tenancy and to have required a new agreement to be made, which would have excluded them from the benefit of the relieving provisions of s. 46. I think that that section means what it says, and that a tied tenant is entitled to the relief it gives "notwithstanding any agreement to the contrary," the word "any" applying as much to the date as to the form, consideration, duration, or other incidents of the agreement.

I am to some extent fortified in my view by the facts in the case of *Watney, Combe, Reid & Co.* v. *Berners*. (1) I am far from saying that the speech of the Lord Chancellor in the House of Lords is a binding authority upon me, because I do not for a moment suggest that it was intended to decide this point. But it is helpful to me to realize that the exact point, so far as the facts could raise it, was raised by the Lord Chancellor. In that case he states the facts as follows (2): "The public-house was, by an agreement dated January 4, 1911, sub-let by the appellants to one Saile at a slightly increased rent. Saile agreed to purchase the liquor he required for his business as a publican from the appellants, so that the house which in their hands was free became as between them and him a tied house. Saile holds the licence. The duty payable by the licensee was, prior to the Finance Act of 1910, 30*l*. It is now 64*l*." Then the Lord Chancellor says this: "Under section 46 of the Act of 1910, Saile, being bound by the tie to the appellants as to supply of liquor, could recover from them so much of the increase of his licence duty as was proportionate to the increased rent of the licensed premises, or the increased prices of intoxicating liquor supplied, or any other benefit obtained by them from the tie. No question arises as to the appellants' liability under that section to their sub-tenant, Saile." No question arose and therefore I do not for a moment suggest that the Lord Chancellor was deciding the question, but it is helpful to me to know that he dealt with similar facts to those I am now discussing, and I cannot conceive that it would not have been present to his mind, if there had been any substance in it, that Saile in fact was not entitled to the benefit of s. 46, because the agreement which he entered into was after the passing of the Act of 1910.

For these reasons, I think the commissioners were wrong when they declined to determine in this case because the agreement between Pegler and his landlord was made after the passing of the Finance Act, 1910; and, in my opinion, this rule should be made absolute.

(1) [1915] A. C. 885. (2) [1915] A. C. 889.

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TALBOT J. In this case a rule was obtained by Frederick Pegler for a mandamus to the Commissioners of Customs and Excise calling upon them to show cause why they should not be commanded to hear and determine the matter of an application by him to determine the proportion of the increased duty payable in respect of his licence of the City Arms, Bell Lane, Gloucester, occasioned by s. 46 of the Finance (1909–10) Act, 1910. The Act of 1910 brought into operation a new schedule of duties of excise licences for the sale of liquor, involving in many, if not all, cases substantial increases. By s. 46 a licence holder bound by what is commonly called a tie, who is entitled to the benefit of the section, is given a right to recover, either by action or deduction, a proportion of any increase of the licence duty occasioned by the Act, from the person to whom he is tied, that is, from whom he is bound by any obligation, direct or indirect, to buy liquor. Mr. Pegler is, and has been either alone or with his wife, since August, 1911, the licence holder in respect of the City Arms, Gloucester. He, or he and his wife, have held the house under four successive leases from the brewers, the first of which is dated August, 1911, each of which binds the lessee to buy liquor from the lessor. The commissioners have intimated to Mr. Pegler that they have no power to make an apportionment under the section inasmuch as he was not bound by a tying obligation when the Act came into operation in April, 1910; and the question is whether they were right. I assume that there has been a sufficient application and refusal to justify a mandamus if the refusal is wrongful.

In my opinion, though I recognize that the point is one of considerable difficulty, the commissioners are right. The question depends on the first words of s. 46. The words "is bound" are words ambiguous, capable of meaning "is hereafter bound," or "is bound now," that is at the passing of this Act, as the commissioners contend, or "is bound now or at any future time," as the prosecutor contends. Which meaning is right is to be determined by the context and from a perusal of the Act to ascertain the scope and

object of the section. The object appears to me to be to protect a licence holder who has made a contract with his landlord as to the terms on which he is to buy liquor from him, on the footing of having to pay licence duty of a certain amount, from having an increased duty put upon him while he remains bound by the terms of his agreement. Parliament appears to have thought that the lessor who benefited by the fact that his tenant was also bound to be his customer for the liquor, ought in fairness to bear part of the increased cost of the licence which enabled the tenant to sell, and therefore to buy, the liquor. I see no reason, other than the fact that the tenant is bound by a lease made before the increase, for making the lessor share the increase and not the whole of the licence duty; but as to any contract entered into after the passing of the Act I see no ground for making the landlord bear a share of the increase which would not equally justify making him share the whole. It is not to be presumed that the lessor and lessee, when they know the amount of duty, are not capable of making or have not made a fair bargain. The design of the section is to prevent one party only from being burdened by a new impost which neither party could foresee and with reference to which they did not contract. I think the words, "notwithstanding any agreement to the contrary," refer primarily, I do not say exclusively, to the ordinary lessee's covenant to pay the licence duty, which appears in the leases of these premises.

The opinion which I have formed from a consideration of s. 46 gets some support from the language of s. 2 of the Finance Act, 1912, since repealed. That section gives similar, though not identical, protection to lessees of licensed premises which are not tied, and it does so only in the case of premises held under leases or agreements before the passing of the Act of 1910. No satisfactory reason for this has been suggested other than that Parliament, believing that s. 46 of the Act of 1910 related only to licence holders bound by tying agreements in force at the passing of that Act, intended to put lessees of free houses, who were equally caught, if I may so put it, by the increased taxation of 1910, under like

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protection. I feel, I need scarcely say, the force of the argument that the insertion of a very few words would have put what I conceive to have been the intention of Parliament beyond a doubt; but, after all, this is not the only statute of which the language is ambiguous, and in all such cases the Court is obliged to interpret the words by what appears to be the reason and purpose of the enactment. Moreover, it is for the party who claims the benefit of the section to show that he comes within its terms. I do not think that the case of *Wooler* v. *North Eastern Breweries* (1) has any real bearing on the case before us. That was a case on the construction of s. 3, sub-s. 3, of the Licensing Act, 1904 (4 Edw. 7, c. 23), relating to the compensation charge imposed by that Act. The sub-section is as follows: "Such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence holder who pays a charge under this section and also by any person from whose rent a deduction is made in respect of the payment of such a charge." The decision was that the words, "notwithstanding any agreement to the contrary," covered agreements whether made before or after the passing of the Act. It was quite clear there that any person who at any time made the payment mentioned was entitled to make the deduction; and the words preventing the defeat of this protection by agreement were held to operate so long as this protection itself endured. The question which we have to decide, which is not as to the meaning of the same words, "notwithstanding any agreement to the contrary," in s. 46 of the Act of 1910, but of earlier words by which the whole operation of the section is governed, is obviously quite different.

In the circumstances it is not necessary to refer to the other points raised. Upon the ground which I have stated I am of opinion that the rule should be discharged.

AVORY J. The question to be determined in this case is whether s. 46 of the Finance Act, 1910, is to be construed as applying only to licence holders who, at the time of the coming

(1) [1910] 1 K. B. 247.

into operation of that Act, were under agreement or obligation to obtain a supply of intoxicating liquor from any person, usually called tied tenants, or whether it applies to licence holders who thereafter come under such an obligation. It appears by the correspondence exhibited that the commissioners have, since the passing of the Act, consistently acted on the view that the section does not apply to licence holders who thereafter enter into such agreement or obligation; and that view has not hitherto been challenged. This is not in any sense conclusive; as Mr. Birkett has reminded us, something more than courage is required to litigate a new question of law with a Government department. I do not think that we derive any assistance from the decisions in the cases which were quoted of *Wooler* v. *North Eastern Breweries* (1) and *Watney, Combe, Reid & Co.* v. *Berners*. (2) In the former case the words in the Act, "any licence holder who pays a charge under this section," clearly referred to the future; and in the latter case the point now in question under s. 46 was not in issue. It must be admitted, I think, that the initial words of s. 46, "Where the licence holder is bound by any covenant," are capable of either construction; but having regard to the context and the circumstances in which the Act was passed, I have come to the conclusion that the intention of the legislature was to give relief to a licence holder who is called upon under the Act to pay an increased duty beyond that which he had paid before the Act, and that the words "as may be agreed upon" contemplate a tenancy agreement prior to the Act, because it may be assumed that any tenant who becomes such after the Act, knowing the amount of duty which will have to be paid, will make terms accordingly with his landlord. This view is, I think, confirmed by reference to s. 2 of the Finance Act, 1912, which appears to me to be intended to put the free tenant on the same footing with regard to the duty as the tied tenant had been put in the Act of 1910. The fact that the Act of 1912 was repealed in 1915 (3) does not, in my opinion, affect the construction of it.

(1) [1910] 1 K. B. 247. (2) [1915] A. C. 885.
(3) By 5 & 6 Geo. 5, c. 89, ss. 18, 51, sub-s. 2, Sch. V.

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It is also, I think, worthy of observation that s. 47 of the Act of 1910, which empowers the commissioners to allow a reduction from the duty in cases where a capital sum has been paid for monopoly value on the grant of a new on-licence, apparently applies only to cases which have arisen before the Act. The words in that section, "where a capital sum has been paid," in my view clearly refer to cases where a new on-licence has been granted and a monopoly value fixed prior to the Act coming into operation. Further, I think that the observations of Parke B. in the case of *In re Knight* (1), observations which are quoted in the case of *Wooler* v. *North Eastern Breweries* (2), although under a different statute, are applicable here and afford support to the view which I have expressed on the construction of s. 46. In *In re Knight* (1) Parke B. was dealing with a statute which provided for the rebuilding of a church and empowered trustees to levy rates upon all houses in the parish, one-half to be paid by the landlord and the other half by the tenant, and which provided that the tenant was to pay the whole rate in the first instance and to take a moiety thereof out of the rent, the landlord being required to allow such deduction notwithstanding any agreement to the contrary. Parke B. said (1): "The words in the local Act may be reasonably construed to mean, notwithstanding any agreement subsisting between the parties at the time of the passing of that Act. The parties could not foresee that the expense of building a church would be imposed upon the parish. But if the agreement is made after the passing of the Act, then the party who enters into the agreement has no good ground for not paying these expenses." Those observations appear to me to apply to this case, that is, the case of a tenant who has entered into an agreement before the passing of the Act. For these reasons I think the rule should be discharged; and having come to that conclusion upon the main question, it is not necessary to consider whether there was in this case any demand made upon the Commissioners of Customs and Excise sufficiently explicit to found this application; nor is it

(1) (1848) 1 Ex. 802, 803. (2) [1910] 1 K. B. 249, 252.

necessary to consider whether the delay which has undoubtedly taken place since the year 1917 would have been fatal to it.

I agree with my brother Talbot, therefore, that the rule should be discharged.

Rule discharged.

W. L. L. B.

The applicant appealed. The appeal was heard on July 20 and 21, 1927.

Roland Burrows and *H. S. Palmer* for the appellant. The question is whether s. 46 of the Finance (1909–10) Act, 1910, applies only to tenancies already existing when the Act came into force, or applies also to tenancies created subsequently. Pegler has been licensee since 1911, and has renewed his licence from year to year. All his leases, whether yearly as at first, or the one under which he now holds, made his a "tied" house. Sect. 46 applies "notwithstanding any agreement to the contrary," and those words were held in *Wooler* v. *North Eastern Breweries* (1) to include agreements made after the passing of the Licensing Act, 1904, and the Court did not adopt the restriction placed upon those words by Parke B. in *In re Knight.* (2) The Finance Act, 1912, s. 2 (now repealed), extended the provisions of s. 46 to "free" houses held under a lease or agreement made before the passing of the 1910 Act, and in *Watney, Combe, Reid, & Co.* v. *Berners* (3), a decision on the effect of s. 2, there are dicta by Kennedy L.J. and Lord Haldane in favour of this appellant. The words of s. 46 are "where the licence holder is bound," and the word "is" refers not only to the time of the passing of the Act, but includes "shall or may hereafter."

[SCRUTTON L.J. The meaning of "is" was discussed in *Bourke* v. *Nutt.* (4) It might mean is bound when the matter comes under adjudication by the Court.]

The commencing lines of s. 46, we submit, are only an enlarged definition of the words "a tied holder," and are

(1) [1910] 1 K. B. 247.
(2) 1 Ex. 802.
(3) [1914] 3 K. B. 288; [1915] A.C. 885, 889.
(4) [1894] 1 Q. B. 725.

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equivalent to "In the case of a tied holder, he shall be entitled notwithstanding any agreement to the contrary"—i.e., whenever made—because this was a permanent increase in the tax. The agreement must be treated as being made "with due regard to the existing law of the land": per Lord Moulton in *Bristol Corporation* v. *John Aird & Co.* (1) Sect. 46 was not a provision for a temporary adjustment between landlord and tenant in respect of existing tenancy; if it was, then its proper place would have been under the "Temporary Provision" part of the Act. We submit that the increase being permanent, s. 46 applies to a tenancy whenever created.

Sir Thomas Inskip S.-G. and *W. Bowstead* for the Commissioners of Customs and Excise. Sect. 46 is not functus officio, because many long leases are still in existence, and that negatives any objection on that ground to the construction for which we contend.

"'Where the licence holder is bound" means, we submit, an existing tied tenant, and "notwithstanding any agreement to the contrary" must apply to his agreement. The words cannot apply to a subsequent agreement made with a knowledge of the Act. The words "so much of any increase of the duty payable in respect of his licence occasioned by this Act" are more apt to our interpretation of the section, and refer to the increase so far as an existing tied tenant is concerned. It would be a forced construction to say that a tenancy agreement is affected by an Act passed many years before the agreement was made. The Act of 1912 made it clear that it was dealing with agreements made before the Act of 1910. This is clearly a case to which the principle applies which was stated by Talbot J. in the Court below—namely, that the person who seeks the benefit of the Act must show that he clearly comes within the principle of the Act. The dicta in *Berner's* case (2), to which reference has been made, were not necessary for any question raised in that case. In *Wooler's* case (3) there was a clear right to make the deductions, and no such point as arises here arose there.

(1) [1913] A. C. 241, 257. (2) [1914] 3 K. B. 288; [1915] A. C. 885.
(3) [1910] 1 K. B. 247.

The context and the object of the Act of 1910 must be considered, and the object was to correct the incidence of the burden imposed by the Act under an agreement made before and in ignorance of the Act.

Mitchell Banks K.C., *Croom-Johnson K.C.* and *Gordon Clark* for the landlords adopted the same line of argument, and pointed out that an increase connotes something that already exists.

Roland Burrows in reply.

LORD HANWORTH M.R. In this case a question comes up for decision from the Divisional Court which is, we are told, of some general importance; and, no doubt, the section we have to construe is one which presents difficulties. The facts of the case have been presented fully in the judgment of Swift J. in the Divisional Court.

The question that we have to determine is whether s. 46 of the Finance (1909–10) Act, 1910, applies where there has been an agreement entered into after the passing of that Act. By that Act, which reimposed the original Budget introduced for 1909–10, increased duties on liquor licences were imposed. Sect. 43 says that there shall be charged, levied and paid on the licences, the sums specified in the first schedule to the Act, and it provides also that those duties are to be charged in a particular way. The charging section, in other words, recognizes that by the imposition of these increased duties a new situation has been created, one which must be dealt with in order to meet the complexity of the licensing system; and thus in the very charging section, s. 43, it is provided that in the case of licences which have been granted after July 1, 1909, and before September 30, 1909, the amount of the duty that would have been imposed under the new clause is not to be imposed, but the duty is to be adjusted so as during those three months, to impose only such a sum as would have been payable if the new Act had not been passed. There are a number of provisions collected in s. 53, which is labelled "temporary provision." The need, therefore, of fitting the new duties into the existing state of circumstances is clearly demonstrated.

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Sect. 46 was intended to deal with the case of a tied tenant. In such cases the imposition of an increased liquor licence duty creates a new situation between the landlord and his tenant, and it seems to me that s. 46 was intended to deal with that position as it existed at that time; that is to say, just as it was necessary to deal with the existing situation from other points of view which I have mentioned, so it was necessary to deal with the licence holder who was a tied tenant. The way in which the section deals with it is this: it mitigates the difficulty which would arise to the tied licence holder under the existing agreements, whereby he would be bound to obtain his intoxicating liquors from his landlord, and would therefore have imposed upon him the result of the new duties.

Coming now to the section, it opens with words which are agreed by all parties to be colourless, and which do not indicate how far and for how long the section is to be effective, or upon what agreements it is to be effective. The section begins: "Where the licence holder is bound by any covenant, agreement or undertaking." Those words may be operative at any time when the question comes to be determined. On the other hand, they may be restricted to such cases as existed at the time of the passing of the Act and where there was, by agreement or lease existing at that time, a covenant whereby the licence holder was bound.

We must look at the context generally. We can find, as I say, no light from the opening words; but when we come to the later words of the section, it appears to me that the purpose of the section was to reopen the whole matter and to restore the freedom to both parties to make an agreement in reference to the new duties; that is to say, to leave the parties to deal by agreement with a situation which neither of them foresaw or contemplated at the time of their original agreement.

The words which lead me to put this construction upon the section are "notwithstanding any agreement to the contrary." Those words obviously reopen the matter and break down the existing agreement. Then "the licence holder shall be

entitled to recover as a debt due from, or deduct from any sum due to, any such person," that is, the person to whom he is bound, "so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon." Those words "occasioned by this Act" appear to refer to matters which are introduced and caused by the Act of 1910, and by those words "notwithstanding any agreement to the contrary" and the words "as may be agreed upon," complete freedom is once more conferred upon both parties; they may agree, if they can, and if not, the matter is to be determined by the commissioners; but it has to be determined by the commissioners "proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit obtained by such person by reason of any such covenant, agreement, undertaking or obligation as aforesaid" . . . . and I think we must add "occasioned by this Act."

If that section were to apply to agreements which were made subsequent to the Act, then, although the increased duties were before the parties at the time when the agreement was made, and although the new situation was one which was obviously to be dealt with by them, it would give an opportunity to a tied tenant to reopen his relation to his landlord, even though he had made a new agreement in full sight of the new duties imposed by the Act. That appears to me to be a situation not contemplated and not intended by the Act. On the other hand, if the effect is given to s. 46 which the majority of the Divisional Court held it had, it appears to be a useful provision meeting a new situation, a situation such as was referred to in the words of Parke B. in *In re Knight* (1), a situation which the parties could not foresee.

I find no assistance from the cases that have been cited. The observations in the House of Lords in *Berner's* case (2) appear to me to have been made before any careful consideration had been given to this section. It has been suggested that we may find some assistance from the terms of s. 2 of the Finance Act, 1912.

(1) 1 Ex. 802. (2) [1915] A. C. 885.

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I am not sure that that section could be deemed to be a Parliamentary interpretation of the previous Act of 1910, but I think that the observation made by the Solicitor-General is well founded, that when in 1912 the distribution of payments on account of licence duties was being dealt with in the case of a free tenant, it would have been necessary, in 1912, to recognize that by the lapse of time in those two years there would be not merely the agreements or leases existing in 1910, but some leases or agreements made since the Act of 1910 came into operation, and thus it would be necessary to specify upon which of the leases or agreements the new section was intended to operate. Thus it is that we find the words in that section "made before the passing of the Finance (1909–10) Act, 1910." But beyond this, that the interpretation which I think s. 46 ought to bear brings the section into line with the subsequent section, s. 2 of the Act of 1912, I cannot derive any assistance from the later Act, and I am not sure that any valid ground is obtained for decision on the ground that by the interpretation which I accept, the two sections, s. 46 and s. 2, appear to correspond in their operation. There may well have been reasons in the case of free tenants which did not apply to tied tenants. However that may be, by looking at s. 46 itself and considering the situation that had to be dealt with, I have come to the conclusion that the purpose of it was to restore freedom of contract in the cases in which it was necessary to restore it—namely, in those agreements which were subsisting at the time when the Act was passed. So far it was necessary. In the case of agreements made subsequently to the passing of the Act and with knowledge of its terms, freedom of contract was then left to the parties contracting, and the operation of the section was not necessary to confer that right upon them.

For these reasons I agree with the judgments delivered by Talbot and Avory JJ., and I think the appeal ought to be dismissed.

SCRUTTON L.J. This is quite a short question, turning on the meaning of a few words in an Act of Parliament. That

it is not an easy one is obvious from the fact that there was a division of opinion in the Court below, and that there is a division of opinion in this Court. I have come to the conclusion, after listening very carefully to the arguments addressed to me, that the view taken by Swift J. in the Court below was the right one, and while naturally doubting my own opinion, as my brothers disagree with me, I feel bound in fairness to the parties to express the opinion which I have formed.

It appears to me that, in construing this section, I must first of all look at the words used, and if I can, give them their ordinary meaning. It may be that the words used in other parts of the Act and the scheme of the Act will require me to give to some words a meaning which is not their ordinary English meaning. If so, I must do it. If I can gather from the scheme of the Act, as shown in the words used, any reason for limiting the ordinary meaning, I must do it.

Some things I am not entitled to take into account. I am not entitled to take into account what any Minister, who was proposing the Bill, said in the House that he meant by the words. I cannot look at that. I cannot look at what the draftsman of the Act, if he has written a text-book about it, says he meant by the words; he must be judged by the words he has used, not by what he now thinks he meant by them. In my view I am not entitled to speculate what the meaning of the words used may be or what the intention of Parliament in using the words may have been, unless I have some sound foundation of evidence to go on. It is open, in my view, to give evidence of facts existing at the time when the Act was passed, in order that you may gather what the evil was which was intended to be removed. But to speculate that the facts may have been so and so or so and so, and to use that speculation as a means of construing the Act is, in my opinion, what I am not entitled to do.

I have expressed the matter in my own words, but I entirely agree with and desire to adopt the language which Lord Sumner used in *Berner's* case (1) about the way in which an Act of Parliament should be construed; and I do it with the more

(1) [1914] 3 K. B. 288, 297.

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readiness as Lord Sumner was the dissenting judge in that case, whose judgment was accepted by the House of Lords. Lord Sumner says: "I think we are not entitled to make any assumptions about the policy of the sections, but have simply to construe them. It seems to have been the view of the Divisional Court that the Legislature could not have meant a liquor-seller to make a profit out of the increase of duty, at any rate not out of the landlord. I think this is an assumption, not a construction. It is an accident that the claimants here are brewers; they succeed, if at all, as mesne landlords. We were given numerous illustrations, by means of hypothetical figures, of the way in which the section might work on alternative constructions of it. These would be very proper for the consideration of those who enacted the section. I think them of no assistance for us, who have only to construe it. When grammar fails arithmetic will not help us out; so I do not discuss them. The words of this section exactly fit the case before us, and it is only by assuming a limited object for the enactment that a limitation can be put on its words. I have no knowledge of the object in view beyond the enactment itself, and no right to use it if I had any."

I proceed to deal with the section, acting under those directions, with which I thoroughly agree. The Finance (1909–10) Act, 1910, was imposing an increased licence duty, and s. 46 provides this: "Where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating liquor from any person or persons, the licence holder shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from or deduct from any sum due to any such person so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon, or in default of agreement determined by the commissioners to be proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit obtained by such person by reason of any such covenant, agreement, undertaking,

or obligation as aforesaid." Now begin at the beginning: "Where the licence holder is bound": does this mean "is bound at the time when the commissioners come to determine how the increase of the licence duty should be obtained," or does it mean "is bound at the passing of the Act"? In my view, the ordinary meaning of those words in the English language is: is bound at the time when the question becomes material to be determined by the commissioners. The present tense of the verb "to be," "is" or "are," or "being," has been constantly interpreted by the Courts as ordinarily relating to the time when the legal bearing of the facts existing at that time has to be ascertained

I take Sir George Jessel in *Ex parte M'George* (1); offence alleged: "That being a trader he had departed from his dwelling house or otherwise absented himself." Question: Whether it meant being a trader at the time he departed or at the time when the debt was incurred? Sir George Jessel said: "What do the words mean? Their literal meaning is, carrying on trade at the time when the act in question is committed."

Take the case of *In re School Board Election for the Parish of Pulborough. Bourke* v. *Nutt.* (2) The words were: "Where a debtor is adjudged bankrupt." Question: Whether that includes a judgment before the Act is passed, or relates to the period at which the disqualification has to be established, the present time? Held by the Court that it relates to the present time, the time when the disqualification is being investigated.

In my view, I am giving the ordinary meaning of the English language, if there is nothing more in the Act to stop me, to the words "Where the licence holder is bound," to say that it relates to the time when the commissioners come to consider whether they have jurisdiction to divide the increase of duty paid in that year between him and the landlord, and therefore relates to the question whether at the time when they adjudicate he is bound by a tie on liquor supplied.

Starting then with this, that the first part of the section, in its ordinary meaning of the words in the English language.

(1) (1882) 20 Ch. D. 697, 699. (2) [1894] 1 Q. B. 725.

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applies to the time when the commissioners adjudicate and therefore to an agreement in force and possibly earlier than or possibly after the passing of the Act, but in force at that time, is there anything, first of all in the section itself, which shows that I ought to put another meaning on the words "is bound" and to say they mean is bound at the time of the passing of the Act—words which are not used in the section, words which are used in the Act of 1912 when Parliament wanted to say that, words which I feel unable to imply unless I can find some clear reason in the other words of the section or the policy of the Act as shown in the words used in other parts of the Act?

The main argument of the Solicitor-General, that I am to limit the word "is" by writing in after it "at the time of the passing of the Act," is found in the words following the passage I have read: "the licence holder shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due . . . . so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon, or in default of agreement determined by the commissioners." Now, as I understand, the Solicitor-General says that the Act allows the licence holder to agree the proportion. If that is so, you cannot assume that agreements made after the passing of the Act, settling the proportion, or settling that the whole is to be borne by one party or the other, are excluded by Parliament. You ought not to trench upon freedom of contract.

I agree that it is a difficult section to understand, and two judges in the Court below have, in my view, rested their judgment largely upon the consideration that you ought not to assume that Parliament is interfering with freedom of contract. Talbot J. says: "It is not to be presumed that the lessor and lessee, when they know the amount of duty, are not capable of making or have not made a fair bargain."

Avory J. says: "It may be assumed that any tenant who becomes such after the Act, knowing the amount of duty which will have to be paid, will make terms accordingly with his landlord." Now I cannot help knowing from the Acts,

and I only take the Acts themselves, that Parliament in the last thirty years has constantly interfered to prevent parties of full age making bargains with each other except in the terms of the Act. It has generally done so in cases where it thinks (I am only referring to the terms of the Act, because I know nothing about anything outside) that the two parties are not on equal terms as to bargaining. For instance, four years before this Act was passed, the Courts up to that time having said that workmen and employers might contract out of the Workmen's Compensation Act, Parliament in 1906, and again in 1925, expressly forbade any agreement, made either before or after the passing of the Act, that the Act should not apply. But in the same Act it expressly allowed agreements as to amounts of compensation under certain circumstances. It has done the same in numbers of other cases in the last thirty years, and if I am asked why, having forbidden any agreement to the contrary, which clearly shuts out some forms of agreement, it yet authorizes an agreement as to amount, it seems to me that there are two, I will not say equally probable, but two possible views. One is that Parliament meant to say that only agreements to the contrary made before the passing of the Act were to be not in force, but allowed agreements to the contrary made after the passing of the Act. That is one view of the case. Another view is that it disallowed all agreements of tenancy, that is to say, all agreements where the tenant had to make his bargain with the landlord in order to get the tenancy, because the two parties were not on equal terms, but allowed a man who was a tenant, and who therefore had not to bargain with his landlord in order to get a contract of tenancy, to agree the amount of the apportionment of the increase of duty. Those two views seem to me about equally probable. I know of no facts, there is no evidence of any facts, which enable me to tell how far tied tenancies predominated over untied tenancies, but I do know that Parliament in the last thirty years has constantly interfered between landlord and tenant for the protection of the tenant, because the landlord and tenant are not on equal terms, in the view of Parliament,

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and that is the justification of the Rent Restriction Acts which have continued.

Looking, therefore, at that argument, which seems to me to be the strongest argument that can be put on the Solicitor-General's side, I am left in this position, that the first part of the section appears to me to be clearly, in the ordinary meaning of the words, in favour of the contention of the tenant in this case, and that the second part of the section appears to me to be equally consistent with either view; and if I am to try to get the intention of Parliament from the language, I can find no means of deciding one way or the other what was intended by that part of the section. It did intend, in my view, to leave a fairly permanent section, judging by the language of the section. "Where the licence holder is bound" only relates to an agreement at the time. His licence was only for three months, and the construction put upon the matter by the Solicitor-General would apparently restrict the whole question to the last three months of the year 1910, as appears by s. 43. I am not able to take that view.

I do not know that you get very much light from the case of *Wooler* v. *North Eastern Breweries* (1) except that the general words were used to cover agreements made after the passing of the Act and freedom of contract was trenched upon. The only bearing of *Berner's* case (2) seems to be that in a case whereof the various judges who considered it and came to conflicting opinions, and who found it necessary to consider the relation of the Act of 1910 to the Act of 1912—although what they had to decide was the meaning of the Act of 1912—three, including judges who took either view of the question, took the view that the Act of 1910 did apply to contracts made after the Act was passed. Now I agree that it was not what they had to decide, except in the sense that they looked at the Act of 1910 to compare it with the Act of 1912 to see whether they could get any light on the construction of the Act of 1912 from the Act of 1910. They came to the conclusion that they could not, because the two Acts were dealing with different subject-matters, but three of them, Kennedy L.J.,

(1) [1910] 1 K. B. 247. (2) [1914] 3 K. B. 288; [1915] A. C. 885.

Lord Haldane and Lord Wrenbury, all cited the Act of 1910 as applying to a tied contract made after it was passed, and it is some consolation to a judge in the minority to find that three other judges have taken the same view of the matter.

Lastly, can I get any light on the construction of s. 46 from any view formed on the whole Act as to the policy of the legislature? Sect. 46 clearly does this: where a licence duty is increased, if the tenant has a tie, it enables him to put part of the duty on his landlord. If the tenant has no tie, it does not. Now I am quite unable to see any policy in that, one way or the other. Why the fact that the tenant has a tie should enable him to put part of the duty on the landlord, but why the fact that a tenant has not a tie should exclude him from that benefit, I am quite unable to understand. I have no evidence of any facts which will help me, and I am unable, as Lord Sumner was unable in *Berner's* case (1), to make any assumptions or speculations as to the policy of the legislature in the matter.

For these reasons, which I have expressed at some length, because I think the parties are entitled to have my opinion, even if I am in a minority, I come to the conclusion that the view taken by Swift J. in the Court below was the right one; that s. 46 does apply to tied covenants made after the passing of the Act; and that, if so, the commissioners were bound, on an application being made to them, to apportion the increases between the tenant and the landlord.

SARGANT L.J. By Part II of the Finance (1909–10) Act, 1910, considerable increases were made in the duties payable in respect of licences, and by s. 46 of the Act arrangements were made, as is correctly stated in the marginal note to the section, for the distribution of payments on account of licence duties in certain cases. Those certain cases were cases where there were tied houses.

The question here is whether s. 46 was merely intended to deal with cases which existed at the passing of the Act, and to cure a hardship which might otherwise fall upon the tenant

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rather than the landlord, or whether s. 46 also applies to agreements that might be entered into in the future.

For determining this, it is, of course, necessary to read the words of the Act in the ordinary meaning of the English language as applied to the particular matter being dealt with. The first question that has to be considered is what is the meaning of the words "where the licence holder is bound"? Does the word "is" in itself mean is bound at the passing of the Act, or is bound at the time when the matter comes to be dealt with in the future? I differ from the judgment that has just been delivered in this, that I do not think there is any presumption in favour of the latter meaning rather than of the former. It seems to me that the word "is" is completely ambiguous, and I adopt what was the view of Talbot and Avory JJ., that it may mean either one or the other equally, and that whether it means one or the other is to be determined by the language of the rest of the section and the consideration of the purpose of the Act so far as that appears from the Act.

The first matter that I think I ought to deal with is the meaning of the words "notwithstanding any agreement to the contrary." Do those words mean "notwithstanding any agreement to the contrary existing at the passing of the Act," or "notwithstanding any agreement to the contrary that may thereafter be made"? It is no doubt the case that in many instances Parliament has thought fit to interfere with the freedom of contract between landlord and tenant and between other parties, and the instances in which that freedom of contract has been interfered with have been growing and have been more numerous of late years than they were; but, nevertheless, I think that this observation is true, that where of two equally admissible constructions of a section of an Act, one leads to an interference with freedom of contract in the future and the other does not, the second construction is the one that is preferable and ought to be adopted by the Courts.

In this case is there anything in the Act to show that in the future it was likely that landlords would have such an

advantage over tenants that it was necessary or expedient to limit the freedom of contract as between them in the future? I do not find anything at all in the Act which leads me to the conclusion that Parliament was of opinion that freedom of contract in this instance should be interfered with as between landlord and tenant, and indeed I find in this very section itself considerable indications that that was not the intention. Because if the words "notwithstanding any agreement to the contrary" are held to prevent landlords and tenants after the passing of the Act making an agreement prohibiting the payment of the increase of licence duty by the tenant, some words which come a few lines afterwards entirely let in that freedom of contract; because the section goes on to provide that notwithstanding any agreement to the contrary, the tenant or licence holder may recover as a debt or may deduct from any sum due to any such person so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon. So that in any future agreement of tenancy it would be perfectly competent for the landlord to agree with the tenant that the tenant should deduct only one per cent., for instance, of the amount which the tenant as licence holder had to pay in respect of this increase in duty, and I think in fact under the words, "so much as may be agreed upon," it would be permissible for the landlord to agree with the tenant that he should not deduct any part of the increase of the licence duty.

Therefore in my judgment those words "as may be agreed upon" are words which point to this, that the words "notwithstanding any agreement to the contrary" are not words prohibiting contracts in the future, but are words which are applicable only to contracts made in the past, and are aimed at preventing existing contracts being rendered unfair by reason of a wholly unexpected duty being imposed, which ought to fall on both landlord and tenant in certain proportions, and to prevent any such contract having the effect of making the burden fall exclusively upon the tenant.

Then again come the words "any increase of the duty payable in respect of his licence occasioned by this Act." To

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my mind those words refer much more aptly to the increase under the Act of the duty payable in respect of a licence under an existing contract than to an increase of duty occasioned by the Act payable in respect of some future agreement altogether. It seems to me that Mr. Mitchell Banks' argument was well founded, that in speaking of an increase you have in mind something that already exists; you have in the case of existing agreements a definite measure, and you have, by reason of the passing of the Act, an increase occasioned in that definite existing measure. But with regard to future contracts, when the landlord and tenant are agreeing how the whole has to be dealt with, because of course they would not in terms agree specially how the increase of the duty has to be dealt with, it seems to me that in such cases as that the amount that would be paid by the tenant under that future agreement could hardly be aptly described as an increase of the duty payable in respect of his licence occasioned by the Act. There was no increase of duty, because there was no original duty, for they had made no bargain and the licence had not been taken out. The causa proxima which causes the tenant to pay the duty is not the passing of the Act at all, but the fact that the tenant has made a bargain with the landlord subsequent to the Act under which there is some agreement for the payment of the whole of the existing duties, including, of course, the increased duty imposed by the Act itself. Those words also seem to me to be more compatible with the meaning of the section which has been adopted by the majority of the Divisional Court.

With regard to the Act of 1912, if there is any indication in it in favour of the construction which appears to me the right construction of s. 46, it is so faint that I do not think it is of any real assistance, having regard to the much more definite assistance rendered by the two portions of the section to which I have already referred.

It seems to me that the case is one which is of the same class as *In re Knight* (1), where Parke B. took the view that the reasonable meaning of the Act appeared to be to deal with

(1) 1 Ex. 802.

existing tenancies in view of what might otherwise be an unjust distribution of a new burden not expected by either party.

With regard to *Berner's* case (1) I will only say that there the question was a very different one. There, under the actual language of the Act, the limitation that had been imposed on the operation of the Act by the decision of the majority of the Court of Appeal really depended upon the introduction into the actual words of the Act of some additional words, and the House of Lords declined to sanction that introduction. Here there is no question at all of introducing any additional words. The whole question is whether the word " is " means is at the passing of the Act, or is at the time when the question comes to be determined. In my judgment it is equally capable of either interpretation. The two reasons which I have given seem to me to point to its being limited to the date of the passing of the Act, and it being, as is pointed out by Talbot J., for the applicant to justify the apportionment which he has sought from the commissioners, it is for him to make out his case, and in my judgment not only has he failed to make out his case but the true interpretation of the section is definitely against him.

I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Maitland, Peckham & Co., for Lane, Martin & Co., Gloucester.*

Solicitors for the respondents: *Solicitors of Customs and Excise.*

Solicitors for the landlords: *Godden, Holme & Ward, for Haddock & Pruen, Cheltenham.*

(1) [1915] A. C. 885.

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June 21, 22, 29.

LOOKER AND ANOTHER *v.* LAW UNION AND ROCK INSURANCE COMPANY, LIMITED.

[1926. L. 2485.]

Insurance (Life)—Contract—Conclusion of—Proposal—Acceptance — Intervening illness of Assured—Increase of Risk—Non-disclosure.

In a proposal to an insurance company for an insurance on his life the proposer stated that he was free from disease or ailment, and declared that the particulars in the proposal were true and that the proposal and declaration should be the basis of the contract. The insurance company wrote to the proposer stating that the proposal was accepted and that if his health remained meanwhile unaffected, the policy would be issued on payment of the first premium, and that the risk would not commence until receipt of the first premium. Five days after receiving that letter the proposer became ill, two days later his illness was diagnosed as pneumonia, and four days later he died of that disease, no notice of his illness having been given to the company. The day before the proposer's death the company received by post a cheque which had been signed by him three days before for the first premium, and they then sent him a certficate stating that the proposal had been accepted, and that a policy would be delivered in due course. Owing to the insufficiency of the proposer's bank account the cheque was not honoured. In an action by the proposer's representatives against the insurance company for payment of the insurance money or in the alternative for delivery of a policy :—

Held, that the plaintiffs could not recover, inasmuch as no contract had been concluded between the proposer and the defendants, first, because, between the proposal and the alleged acceptance there had been by reason of the illness of the proposer a material alteration in the risk, and, secondly, because no notice of the proposer's illness which caused a material change in the risk had been given to the defendants.

Canning v. *Farquhar* (1886) 16 Q. B. D. 727 and *Harrington* v. *Pearl Life Assurance Co.* (1914) 30 Times L. R. 613 followed.

In re Yager and Guardian Assurance Co. (1912) 108 L. T. 38 observations applied.

ACTION tried by Acton J. without a jury.

At the date next hereinafter mentioned William Looker was a man of about forty-four years of age of exceptionally strong physique, who had up to that time enjoyed very good health. He had for twenty years practised as an osteopathic surgeon, and held qualifications as such from universities in the United States of America. On July 10, 1926, he sent in to the Law Union and Rock Insurance Company a proposal

for an insurance on his life in a sum which was eventually increased to 5000*l*. In the proposal, in answer to certain questions he stated that he had been engaged on war service as surgeon and had been shot in the right foot, and to the question "Are you now free from disease or ailment?" his answer was, "Yes." That was followed by the declaration: "It is hereby declared that the above particulars are true, and it is agreed that this proposal and declaration shall be the basis of the contract of assurance." On July 15 the insurance company sent a conditional acceptance of the risk in these terms: "I beg to inform you that the proposal made by you to this company to effect an assurance on the life of yourself for the sum of 5000*l*. with profits, has this day been accepted, and if the health of the life proposed remains meanwhile unaffected the policy will be issued on payment of the first premium as under, subject to satisfactory evidence of age being furnished. . . . . The risk of the company will not commence until receipt of the first premium; and the directors meanwhile reserve the power to alter or withdraw this acceptance." On Wednesday, July 21, Dr. Looker began to feel indisposed. He worked as usual in the morning, but in the afternoon he lay on his bed feeling indisposed. Between four and five in the afternoon, one Colonel Lyon, a friend and pupil of his, called, and they spoke about paying the insurance premium, in the commission on which Colonel Lyon, who believed that the insurance was already effected, had a personal interest. At 8 o'clock on that evening Dr. Shah was called in. On July 22 Colonel Lyon, saw Dr. Looker, who was in bed, made out a cheque for the amount of the first premium, which Dr. Looker signed in bed, and gave it to Dr. Looker's secretary, Miss Edith Moore, to send to the insurance company. For some reason or other it was not, however, sent on that day. Dr. Shah called again the same day and intimated that on the following day he would bring in another doctor. On Friday, July 23, Dr. Shah came in the morning and brought with him Dr. Barber, when pneumonia was definitely diagnosed and from that time onwards. On Saturday, July 24, Dr. Shah considered

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it a grave case. On that day about 2 o'clock in the afternoon Dr. Looker, who was in such a condition that it was undesirable and unsafe to prop him up from a recumbent position, had a will brought into the bedroom, and he signed that will, and his signature thereto was witnessed by Dr. Shah and the acting nurse. Dr. Looker's signature of the will was very shaky and tremulous, forming a strong contrast with his signature of the cheque. The will (it did not appear for what reason) was dated July 17 instead of July 24. About six in the afternoon a Dr. Taylor, a friend of Dr. Looker, called and saw him and suggested another opinion, giving the name of Sir Bruce Bruce-Porter, an eminent specialist. Colonel Lyon asked the secretary if the cheque had been sent and, on her answering that it had not, he put the cheque and the letter into an envelope and posted them before 6 P.M., the original date of the letter and the cheque—namely, July 22, remaining unaltered. Colonel Lyon said that he would not have posted this letter and cheque had he not believed that the insurance was already effective. On July 24 Dr. Looker was not consulted about the cheque and did not authorize what was then done in respect of it. Dr. Looker was delirious that evening and continued to be so through the night. At 9 o'clock a Miss Morris, a trained certificated nurse, was sent for. On Sunday, July 25, at about 12.30 P.M. Sir Bruce Bruce-Porter saw the patient, said that he was suffering from pneumonia, and ordered oxygen, which was administered thenceforward. On Monday, July 26, between 3 and 4 o'clock in the morning Dr. Looker underwent a severe crisis, but came through it. On that morning in the ordinary course of post the insurance company received the letter and cheque. They thereupon sent out a certificate dated July 26 in these terms: "I certify that the proposal made by Dr. W. Looker to effect an insurance on the life of himself for the term of whole life has been accepted by this company for 5000*l.* with profits, and the first quarterly premium having been paid a policy will be delivered in due course." On the following day, July 27, between half past 2 and 3 o'clock in the morning, Dr. Looker died of pneumonia from which

he had been suffering from the morning of Friday, July 23 onwards.

On November 25, 1926, the administrators with the will annexed of Dr. Looker, deceased, brought the present action against the insurance company, claiming payment of the sum of 5000*l.* in respect of an insurance on his life, or in the alternative delivery to them of the policy of assurance for that sum which they had undertaken to deliver upon the life of the proposer.

The defendants in their defence stated inter alia: (para. 2) that they denied that they agreed with Dr. Looker to accept a proposal by him to effect an assurance on his life, and that the letter of July 15, 1926, did not constitute an acceptance of the proposal by him; (para. 3) that they admitted that the deceased sent to them a cheque in a letter received by them on July 26, 1926; that they denied that by a document or certificate of the latter date or at all they accepted or certified or confirmed their acceptance of the proposal or undertook to deliver a life policy for 5000*l.* with profits; and that in so far as the last mentioned document purported to be a receipt for the first premium it was given conditionally; (para. 5) that, alternatively, if the defendants agreed to accept the proposal, their acceptance was subject to the following express conditions: (*a*) that the risk should not commence until receipt of the first premium, and that meanwhile the defendants should be entitled to alter or withdraw the acceptance, (*b*) that the health of the proposer should remain unaffected between the proposal and the receipt of the first premium; (para. 6) that these conditions were not fulfilled in that (*a*) the cheque was returned unpaid by the bank and the first premium was never received by the defendants, (*b*) on or about July 20, 1926, the proposer had a severe attack of pneumonia and thereafter remained in a precarious state of health until his death, and he gave no intimation of that alteration in his health to the defendants; (para. 7) that, in the further alternative, if the proposal was accepted by the defendants on July 26, 1926, or at all, it was so accepted in ignorance of a material fact known to the proposer

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and concealed by him from the defendants—namely, that a material change had taken place in the state of his health since the date of the proposal.

The action was tried on June 21, 22 and 29, 1927.

Evidence was given on behalf of the parties on both sides in support of their respective allegations.

Hawke K.C. and *H. H. Hanworth* for the plaintiffs.
Birkett K.C. and *Harold Murphy* for the defendants.

ACTON J. The plaintiffs' claim is as administrators with the will annexed of the estate of Mr. William Looker, deceased, for 5000*l.* alleged to be due under a contract of life assurance with the defendants on the life of William Looker with profits. [His Lordship stated the facts substantially as above set out, observing in the course of his statement that he was satisfied that as from July 23, if not earlier, Dr. Looker himself and those in attendance upon him knew that he was seriously ill, though not necessarily that he was dangerously ill or that his death was imminent or even probable, and continued as follows:] This is accordingly upon those facts one of those cases in which between the time at which the proposal is made and the time at which it is accepted by the insurance company a material change has taken place in the nature of the risk. The change in the nature of the risk in this case was that on July 10, 1926, when the proposal was made, Dr. Looker was, as he truly represented himself to be, free from disease or ailment, whereas at the time of the acceptance by the insurance company of the cheque drawn by Dr. Looker for the amount of the first premium and the resultant sending out of the certificate of acceptance of his proposal to effect an insurance, Dr. Looker was in a critical condition, which might indeed be described as a dying condition, from an attack of pneumonia from which he died in less than twenty-four hours after the receipt by the insurance company of his cheque.

It is said, in the first instance, for the insurance company that the rule applicable in circumstances such as these is

that the acceptance is made in reliance upon the continued truth of the representations made in the proposal which it was agreed should form the basis of the contract of insurance, in the belief that there has been no material change in the risk offered, and therefore, that if anything has happened materially to increase the risk between the proposal and the acceptance the insurance company are not bound, because that which they have made a condition of the contract going to the root of it has not been fulfilled. The authority for this statement is to be found in *Canning* v. *Farquhar* (1) and *Harrington* v. *Pearl Life Assurance Co.* (2). It is also said materially to strengthen the position of the insurance company that in this case their notice of July 15, 1926, in terms intimated to the proposer that any subsequent acceptance by them of premium and risk would be subject to the condition that the health of the life proposed should remain meanwhile unaffected. That it had not remained unaffected cannot be disputed. It is not indeed putting it too high to say that when the insurance company accepted the premium and the risk on July 26, the deceased was dying, and if the insurance company had known the facts they would never have entertained the notion of accepting the risk for a moment. I think there is no answer in this case to these contentions.

The second point taken on behalf of the insurance company was that there was here a failure to discharge a duty incumbent upon all proposers of contracts of insurance such as these, which are contracts uberrimae fidei—namely, a duty to inform the insurers of any material change in the nature of the risk to be undertaken by them, which means in the present case in the health of the proposed assured, William Looker. Reference was not made, but may I think usefully be made, to the judgment of Channell J. in the arbitration between the parties in *In re Yager and the Guardian Assurance Co.* (3) He says there, " I think it is clearly settled that the law as to fire insurance and life insurance, is the same as it is in reference to marine insurance and that is that a policy is not

(1) 16 Q. B. D. 727. (2) 30 Times L. R. 613.
(3) 108 L. T. 38, 44.

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binding if any material fact is not disclosed, and that that is so whether or not the person who does not disclose it knows that it is material, which is sometimes rather hard upon the assured, and may be so in this case. The question depends upon whether the fact is material or not, and not upon whether the person supposed it to be material. Then the time up to which it must be disclosed is the time when the contract is concluded. Any material fact that comes to his knowledge before the contract he must disclose." In my opinion the contention for the insurance company on this point also is a sound one. This, however, is a case in which the insurance company have been at pains to protect themselves by the introduction into their documents of express terms, the very object and nature of which is to render it unnecessary to consider whether, if they had been absent, the principle enunciated by Channell J. would have had application.

There were two points of minor importance which arose during the hearing of this case; I propose to do no more than refer to them and leave them to be dealt with, if necessary, elsewhere. One was the contention on behalf of the insurance company that the risk was not to attach until the receipt of the first premium by the company, and that in fact it never was received. It was admitted by counsel for the plaintiffs that the deceased's available assets in the bank when the cheque was drawn and presented were not sufficient to meet it on presentation. The other point was one to which it may be that I first drew attention. It was that the letter and cheque dated July 22, which were not posted until the evening of July 24, were then posted in the circumstances which have been narrated above without the authority or knowledge of the deceased himself, although the most terrible and indeed tragic change had taken place in the deceased's condition between the time when the cheque was signed and the time when it was posted. Colonel Lyon himself said he would not then have sent off the cheque if he had not believed that the insurance was already effective, that is to say, as I understand it, that the insurance company were already irrevocably bound and that the acceptance

by them of the cheque could not affect their subsisting contractual obligation.

Upon these facts coming to light, application was made by counsel for the insurance company for leave to amend the defence accordingly by the addition of appropriate words. I thought he should have leave so to amend, but I rest my decision upon his earlier and fundamental contentions as to the principles applicable to this case and established by authority.

In my view, therefore, my judgment ought to be for the defendants with the usual consequences.

Judgment for defendants.

Solicitor for plaintiffs: *R. A. Kenrick.*

Solicitors for defendants: *Kendall, Price & Francis.*

J. R.

[IN THE COURT OF APPEAL.]

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July 19.

GREEN *v.* PREMIER GLYNRHONWY SLATE COMPANY, LIMITED.

Workmen's Compensation—Fatal Accident—Dependants—"Widow or other member of workman's family"—"Children under the age of fifteen"—Widow wholly dependent—Other Member partially dependent—Children's Allowance, how calculated—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 8, *sub-s.* 1; *sub-s.* 3, *rr.* (*i.*) *and* (*ii.*).

In proceedings for compensation under s. 8 of the Workmen's Compensation Act, 1925, the dependants of the deceased workman were his widow, two children under the age of fifteen wholly dependent on his earnings, and a step-daughter aged sixteen in service and only partially dependent:—

Held, that the amount of the children's allowance must be ascertained by reference to the provisions of r. (i.) of sub-s. 3 of s. 8 of the Act, as that rule was complied with if either the widow or the step-daughter, who fell within the words "other member of the workman's family," in r. (i.), was wholly dependent.

Held, also, that the antithesis in rr. (i.) and (ii.) was between dependency and partial dependency, and therefore the fact that the widow was wholly dependent excluded the application of r. (ii.).

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GREEN v. PREMIER GLYN-RHONWY SLATE CO.

APPEAL from an award of the judge of the Carnarvon County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

The deceased workman, Thomas Green, met with an accident on February 1, 1927, whilst in the employment of the respondents, which resulted in his death on February 3. He left surviving him his widow Jane, wholly dependent on his earnings, a step-daughter Jennie Evans, aged sixteen, in service and only partially dependent, and two children under the age of fifteen—namely, Thomas John Evans a step-son, born June 21, 1913, and Edward Green a son, born October 15, 1922.

The dependants made a claim for compensation under s. 8 of the Workmen's Compensation Act, 1925, made up as follows: 300*l.* as the lump sum under sub-s. 1, and 188*l.* 5*s.* for the children's allowance under r. (i.) of sub-s. 3 of the same section.

The county court judge made his award in the following terms: "Jennie Evans not being a child under the age of fifteen years I find that Jennie Evans (age 16) is partially dependent under s. 8 of the Workmen's Compensation Act, 1925. Award 458*l.* 5*s.* for applicants. Jennie to have 30*l.* of this amount. 158*l.* 5*s.* children's allowance. Payment out of 20*l.*"

From this award the dependants appealed.

The grounds of the appeal were that on the admitted facts that Thomas Green left a dependant wholly dependent on his earnings and in addition left children under the age of fifteen wholly dependent, the county court judge ought in law to have calculated the children's allowance in accordance with r. (i.) of sub-s. 3 of s. 8 of the Act of 1925, and that he was wrong in law in holding that the admitted fact that the deceased left also a member of his family other than his widow and not being a child under fifteen only partially dependent required him to calculate the children's allowance under r. (ii.) of the same sub-section.

The question turned entirely on the construction of s. 8 of the Act of 1925.

By sub-s. 1: "The compensation under this Act where death results from the injury shall be a lump sum of an amount calculated in accordance with the rules hereinafter contained, together with, if the workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and in addition leaves one or more children under the age of fifteen so dependent, an additional sum (hereinafter referred to as the children's allowance) of an amount calculated in accordance with the rules hereinafter contained, so, however, that the lump sum and children's allowance (which shall be added together and dealt with as a single sum) shall not in any case exceed in the aggregate six hundred pounds."

By sub-s. 3: "The amount of the children's allowance shall be calculated in accordance with the following rules:—

(i.) If both the widow or other member of the workman's family and such child or children as aforesaid, were all wholly dependent on the workman's earnings, the children's allowance shall in respect of each such child be a sum equal to fifteen per cent. of the amount arrived at by multiplying the average weekly earnings of the workman, or where such earnings are less than one pound, then by multiplying one pound, or where such earnings exceed two pounds then by multiplying two pounds, by the number of weeks in the period between the death of the workman and the date when the child will attain the age of fifteen, fractions of a week being disregarded;

(ii.) If the widow or other member of the workman's family and such child or children as aforesaid, or any of them, were partially dependent on the workman's earnings, the children's allowance shall be such proportion of the sum which would have been payable under the foregoing rule if all such persons had been wholly dependent as may be agreed upon or in default of agreement as may, taking into consideration the amount of the lump sum, be determined by arbitration under this Act to be reasonable. . . . ."

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It was admitted that if the children's allowance was to be calculated according to the method prescribed by r. (i.), the amount was 188*l.* 5*s.*, but if by that prescribed by r. (ii.). it was 158*l.* 5*s.*

Cave K.C. and *O. G. Evans* for the appellants.

Shakespeare and *Austin Jones* for the respondents.

The arguments sufficiently appear from the judgments.

LORD HANWORTH M.R. This case gives rise to a nice question of construction of s. 8 of the Workmen's Compensation Act, 1925. The facts are that on February 3, 1927, the breadwinner of the family died as the result of an accident he met with on February 1, and on the former date he left behind him his wife, Jane Green, who was totally dependent upon him. There were in his family circle two step-children, Jennie Evans, a step-daughter, aged sixteen, who was in service and was only partially dependent, and Thomas John Evans, a step-son, born in 1913, and totally dependent, and there was also a child, Edward Green, born on October 15, 1922, and totally dependent. Taking them in that order as four dependants, three of them, the widow, the step-son and the little son were totally dependent on the deceased workman, and Jennie Evans, the step-daughter, was partially dependent upon him. Sect. 4 which deals with dependants entitled to compensation under the Act by sub-s. 3 provides that unless the context otherwise requires the expression, "members of a family" means (inter alios) wife or husband, and a son, and a step-son, and a step-daughter, so that for the purposes of considering the interpretation of s. 8 we may take these three children as dependants.

The learned county court judge has found, first of all, for a lump sum of 300*l.*, which was calculated to be the sum which is to be paid by the employer under s. 8, sub-s. 2 (i.). Inasmuch as there were these three children, two of them wholly dependent, the effect of sub-s. 3 of s. 8 has been brought into operation. The table under which the amount of compensation is to be ascertained is set out in s. 8, sub-s. 1, of which provides: "The compensation under this Act

where death results from the injury shall be a lump sum of an amount calculated in accordance with the rules hereinafter contained, together with, if the workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and in addition leaves one or more children under the age of fifteen so dependent, an additional sum (hereinafter referred to as the children's allowance) of an amount calculated in accordance with the rules hereinafter contained." It seems to me that for the purposes of this case we have to come to a conclusion as to what is the meaning of that table of persons so set out, and to my mind the right interpretation is this. Where the workman leaves a widow, or alternatively "other member of his family" who is not a child under the age of fifteen, then the words "and in addition" bring in a second category, "one or more children under the age of fifteen." You have therefore the two categories. In the first category there is the widow "or other member of his family" not a child under fifteen, and in the second category there is "one or more children under the age of fifteen." Bringing that interpretation down to sub-s. 3 the words in the commencement of rr. (i.) and (ii.) as I will read them are: "(i.) If both the widow or other member of the workman's family and such child or children as aforesaid were all wholly dependent" and under (ii.): "If the widow or other member of the workman's family and such child or children as aforesaid, or any of them, were partially dependent." It appears to me that the antithesis in r. (i.) and r. (ii.) of sub-s. 3 is between whole dependency and partial dependency, and the right way of treating both those rules is to treat the categories as the same as they were stated to be under sub-s. 1 of s. 8—namely, the first being the widow "or other member of his family (not being a child under the age of fifteen)," the second being "one or more children under the age of fifteen."

Now applying that interpretation to those two rules of sub-s. 3, you get the case where the widow in the one

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category upon the facts here and the "child or children as aforesaid" were wholly dependent, and you find that that r. (i.) fits the case here, because the two categories are represented in fact, there being the widow Jane Green, and there being the children Thomas John Evans and Edward Green, who were children totally dependent. Therefore you find that the facts induced the operation of r. (i.) of sub-s. 3.

Now, the learned county court judge has applied the alternative or antithetical rule, r. (ii.), and he has worked out the figures upon that basis. But it appears to me that is wrong, and you ought to treat, as I have said, these two rules as contradistinguished according as there is total dependency or partial dependency. In the present case the widow was wholly dependent, so that the person who falls within the first category was wholly dependent, and that excludes r. (ii.) from being the operative rule to be applied in this case. Having regard to that interpretation, it appears to me that the learned county court judge has applied the wrong rule, that the rule (i.) ought to be applied in the case where there were dependants in both categories, and the sum, therefore, that ought to be ascertained is, we are told, not in question, a sum of 488*l.* 5*s.* and not 458*l.* 5*s.*

Therefore the appeal will be allowed and the award will be made for the total sum of 488*l.* 5*s.* instead of that reached by the county court judge.

The appeal will be allowed with costs.

SCRUTTON L.J. This is a puzzling section, and I regret that we have not had the advantage of any statement by the county court judge of the reasons for his judgment. I can only endeavour to construe this section by the words used in it, but if I am asked whether I have arrived at the meaning of the words which Parliament intended I say frankly I have not the slightest idea. The section, construed by the words used, appears to me to read in this way. You are going in certain cases to make up the compensation for an accident out of two sums, a lump sum calculated according

to particular rules in sub-s. 2, and the children's allowance under the rules in sub-s. 3. To find out whether you are to have both those ingredients first of all you must see whether the workman leaves a widow "or other member of his family (not being a child under the age of fifteen) wholly or partially dependent." If you can get one person of that class it will do. Then, secondly, if there are also one or more children under the age of fifteen wholly or partially dependent, you are to add to the lump sum the children's allowance. Again, one child will be sufficient to give the allowance. When you come to calculate the lump sum you break away from the conditions which justify you in adding the children's allowance. If there is one dependant wholly dependent, whether he is a dependant over fifteen or whether he is a dependant under fifteen, you deal with it under sub-s. 2, r. (i.), if there is no dependant wholly dependent, but a dependant partially dependent, you deal with it under r. (iv.) of sub-s. 2. You have broken away from the two classes, over or under, fifteen, and you may look at each member of the class over fifteen and each member of the class under fifteen to find out whether or not one of them is wholly dependent. If there is one member wholly dependent you go to r. (i.), and if there is no member wholly dependent but a member partially dependent, you go to r. (iv.) of sub-s. 2. So much for the lump sum.

Then you come to the children's allowance, sub-s. 3, r. (i.): "If both the widow or other member of the workman's family and such child or children as aforesaid were all wholly dependent." Now one dependent member over fifteen has brought the lump sum in. If the workman leaves a widow, and another member over fifteen, does that same construction apply to sub-s. 3, r. (i.)? In other words, when you have found the widow, need you consider other members of the workman's family? I think that just as in s. 8, sub-s. 1, the widow is enough to give you the lump sum without inquiring into the other members of the family, so in sub-s. 3, r. (i.), the widow is enough for you to deal with provided you have got a widow who fulfils the condition, and

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you need not proceed to inquire into the dependent condition of other members of the workman's family over fifteen. The reason why I say that is that I think that to inquire into the other members of the workman's family over fifteen would lead you to read " or " as " and." You do sometimes read " or " as " and " in a statute. In *Brown & Co.* v. *Harrison* (1) MacKinnon J. read " or " as " and " in the Carriage of Goods by Sea Act, 1924, and his decision was confirmed by this Court. (2) But you do not do it unless you are obliged, because " or " does not generally mean " and " and " and " does not generally mean " or." I think Mr. Shakespeare's construction requires us in sub-s. 3, r. (i.), to read " or " as " and," and I am not able to give the meaning which he attaches to " both," that it means all the members of the first class and all the members of the second class, as I understand him to say. I do not think " both " can have that meaning. In my opinion " both " is sufficiently satisfied by saying " both the member of the class whose existence is the first condition making the lump sum payable and the member of the class whose existence is the second condition making the children's allowance payable." Then you pass to r. (ii.), which I am bound to say puzzles me, because I think there is a nice question coming some day when there is a family which adjusts itself to the problem, " If the widow or other member of the workman's family and such child or children as aforesaid, or any of them, were partially dependent." Now the widow here was totally dependent, and I think, following the construction that I have adopted of sub-s. 3, r. (i.), which is the same as I have adopted in s. 8, sub-s. 2, r. (i.), when you get the widow totally dependent, and the widow alone so totally dependent as to make a lump sum payable, you need not inquire into the other members of the class. The doubt that I have is this, and I commend it to Mr. Cave and Mr. Shakespeare for a private discussion outside, supposing the widow had been partially dependent, but Jennie had been wholly dependent, would they have been able to

(1) (1927) 43 Times L. R. 394. (2) (1927) 43 Times L. R. 633

get through then? Could you have rejected the widow and said, "Jennie will do for us, and Jennie being wholly dependent, sub-s. 3, r. (ii.), does not apply"? Fortunately it is not necessary for me to decide that point, and I think that we may wait until a family turns up which raises that problem. At present I do not know what the answer to it would be. But on the lines of construction which I have adopted I think that it is enough that there is a widow wholly dependent to bring the case into sub-s. 3, r. (i.), and as the widow is not partially dependent and the children under fifteen are not partially dependent r. (ii.) does not apply; and it is immaterial that Jennie, a member of the family over fifteen, is partially dependent.

For these reasons I think the appeal should be allowed.

SARGANT L.J. The question here is as to how the children's allowance is to be calculated under the Workmen's Compensation Act, 1925. I do not myself feel much doubt as to what the words in the section mean, my only difficulty is in myself expressing in words what is the alternative view of the two views which I think ought to be adopted. In s. 8, sub-s. 1, in order that there may be the lump sum payable and that there may also be added thereto the children's allowance, the workman must leave "a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and in addition leave one or more children under the age of fifteen so dependent." It seems to me that in order to satisfy the first branch of that condition, all that is necessary is that the workman should either leave a widow, or, if he does not leave a widow, should leave some other member of his family not being a child under fifteen wholly or partially dependent, that is to say, of those two kinds of persons only one person has to be left in order that when the other branch of the condition is satisfied the result may ensue.

Then when you come down to sub-s. 3, r. (i.), the words are: "If both the widow or other member of

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the workman's family and such child or children as aforesaid were all wholly dependent on the workman's earnings." What does that mean? It seems to me fairly clear that in order to qualify there must be a widow wholly dependent or, alternatively to her, an "other member" of the workman's family, as above defined, wholly dependent, and in addition there must be a "child or children as aforesaid wholly dependent." That is to say, it is not necessary, in order to qualify, that both the widow and the "other member of the workman's family" should be wholly dependent, either one of those two persons will do. If there is a widow you have not to take into account as a qualifying term the "other member of the workman's family." Then, having ascertained that one of these two persons was wholly dependent, you have also to find that "such child or children as aforesaid" were wholly dependent.

Then, when you come to r. (ii.), the words are: "If the widow or other member of the workman's family and such child or children as aforesaid, or any of them, were partially dependent." What does that mean? The qualifying persons as before are in the first instance the widow or, alternatively to her, the "other members of the workman's family," and in addition, "such child or children as aforesaid." And then when r. (ii.) goes on to provide "or any of them," it seems to me that "or any of them" must be intended to meet the case of one class only of the qualifying persons being partially dependent.

In this case there was the widow wholly dependent, there were two children wholly dependent, and the circumstance that there was another member of the family who was not wholly dependent but was only partially dependent does not seem to me in any way to prevent r. (i.) of sub-s. 3 applying or to cause r. (ii.) of sub-s. 3 to apply, because it cannot be said that any of the persons whose presence was necessary to qualify under r. (i.) of sub-s. 3 of s. 8 were partially dependent. The only person who was partially dependent was the other member of the family, who is out of the question, because that person

ought not to be considered, inasmuch as there is a widow wholly dependent.

I agree, therefore, that this appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Jaques & Co., for Ellis Davies & Co., Carnarvon.*

Solicitors for respondents: *Barlow, Lyde & Yates, for Carter, Vincent & Co., Carnarvon.*

W. I. C.

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Nov. 24.

Negligence—Horse biting human Being—Knowledge of Propenity to bite Horses—Evidence of Scienter.

A defendant's knowledge that his horse has a propensity to bite horses is not evidence of knowledge of a propensity to bite mankind.

APPEAL from the Mayor's and City of London Court.

The plaintiff claimed damages for injuries suffered by him from the bite of a horse belonging to the defendants. He was crossing Ludgate Hill, and the defendants' horse and van were standing unattended by the kerb, the horse being muzzled. As he passed, the horse attempted to bite him, and he was injured in the face. He claimed damages in the Mayor's and City of London Court. To prove scienter it was shown that the defendants were aware of their horse's propensity to bite other horses, which was the reason for its being muzzled. The jury were asked and answered the following questions: (1.) Did the defendants know, or ought they to have known, that the horse was (*a*) dangerous to other horses? Yes. (*b*) dangerous to mankind? Yes. (2.) Was the injury to the plaintiff caused by the dangerous nature of the horse? Yes. (3.) Were the defendants in the circumstances negligent in leaving the horse unattended? Yes. The jury awarded 25*l.* damages, but the judge entered judgment for the defendants notwithstanding the verdict.

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In giving judgment (adopted by Sargant L.J.) the county court judge (Judge Shewell Cooper), having stated the facts and set out the questions left to the jury with their answers thereto, said: "Now on these findings of the jury, if they can stand, it is obvious that the plaintiff is entitled to judgment. But it is contended on behalf of the defendants that there is no evidence on which the jury could find that the defendants knew or ought to have known that the horse was dangerous to mankind. The only evidence was that the horse had, four months previously, bitten another horse and had in consequence been muzzled at the time of the accident. Two witnesses on behalf of the defendants stated that they had never known the horse to bite or show any tendency to bite mankind. That it had attempted twice to bite other horses subsequently to the accident is irrelevant.

Now the law on the subject is shortly this. There is first the case of *Cox* v. *Burbidge* (1), extracts from the judgments in which have been cited in every animal case since. I am taking the material portion from the judgment in *Manton* v. *Brocklebank*. (2) After drawing a distinction between animals of a fierce nature and animals of a mild nature which do not ordinarily do mischief [Willes J.] says (3): 'As to animals which are not naturally of a mischievous disposition, the owner is not responsible for injuries of a personal nature done by them, unless they are shewn to have acquired some vicious or mischievous habit or propensity, and the owner is shewn to have been aware of the fact. If the animal has such vicious propensity, and the owner knows of it, he is bound to take such care as he would of an animal which is ferae naturae, because it forms an exception to its class.' The next case to which I refer is that of *Osborne* v. *Chocqueel*. (4) The headnote is this: 'In order to support an action for damages for the bite of a dog it is necessary to show that the dog had to the defendant's knowledge bitten or attempted to bite some person before it bit the plaintiff; it is not sufficient to show that it had to the defendant's knowledge

(1) (1863) 13 C. B. (N. S.) 430.
(2) [1923] 2 K. B. 212, 232.
(3) 13 C. B. (N. S.) 439.
(4) [1896] 2 Q. B. 109.

attacked and bitten a goat.' In that case Lord Russell of Killowen concludes his judgment thus (1): 'In the present case the county court judge has not found that the dog, before it bit the plaintiff, had any ferocious disposition towards mankind; he has only found that it was ferocious, and ferocious to the knowledge of the defendant. As I have said, there was no evidence upon which it could be found that the dog had previously bitten or attempted to bite mankind. I am, therefore, of opinion that the judgment was wrong.' Wills J. said (1): 'I am of the same opinion,' and referred to the former strictness in pleading. He goes on thus: 'In *Hartley* v. *Harriman* Lord Ellenborough C.J. said (2): "Unless it be inferred that a dog accustomed to attack men is ipso facto accustomed also to attack sheep, there is no evidence to support this declaration."' Wills J. proceeds: 'If the question were, is it to be inferred that a dog accustomed to attack sheep is ipso facto accustomed also to attack men? I should answer it in the negative.' I next have to refer to *Clinton* v. *J. Lyons & Co.* (3) That was a case of a cat attacking a dog, and the facts shortly were that the plaintiff accompanied by her husband and carrying a pet dog went on the defendants' premises where there was a cat which had kittens. The plaintiff put the dog on the floor and the cat sprang on the dog and bit it, and on the plaintiff picking up the dog and handing it to her husband the cat sprang on to her shoulder and bit her on the arm. Evidence was given that cats rearing kittens were inclined to be savage and in a vicious state, even if gentle otherwise. Ridley J. at the beginning of his judgment says this (4): 'The facts appear to me to shew that the cat was not dangerous to human beings but to dogs, and that nothing would have happened had not the plaintiff taken the dog with her into the room.' And Bray J. said (5): 'It cannot be doubted that a cat is an animal that is dealt with by mankind on the footing that a person may safely keep it. . . . . It is important

(1) [1896] 2 Q. B. 111.
(2) (1818) 1 B. & Al. 620, 624.
(3) [1912] 3 K. B. 198.
(4) Ibid. 202.
(5) [1912] 3 K. B. 207.

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to recollect that the scienter which it is necessary to shew is that the animal had a ferocious disposition towards mankind. . . . . The admission of the manageress that all cats with kittens are vicious and naturally go for dogs does not go far enough. . . . . In my opinion there was no sufficient evidence to support the third finding of the jury.' The third finding of the jury was this. (1) The question was, 'Had the cat (to the knowledge of the defendants), while rearing kittens, a disposition to attack a dog in her neighbourhood and a person holding a dog? Yes.' Then in *Bradley* v. *Wallaces, Ld.* (2), there are passages which appear to me important. That was a case in which a workman was killed by the kick of a horse which belonged, not to his employers, but to third parties, and was left on his employers' premises unattended. The questions under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), which arose in that case are immaterial in the case before me. The county court judge held that the question of scienter on the part of the owners of the horse was immaterial, and that the bringing of the horse on the employers' premises was a trespass, and by reason of their negligently leaving it there unattended they were liable to indemnify the employers. That is dealt with in very great detail in the judgments. Now it appears to me that the effect of those cases is this. In the case of dogs it is clear that to establish liability for a bite on a human being it is not enough to show that to the knowledge of the owner it had bitten other animals—for example, a goat, as in *Osborne* v. *Chocqueel.* (3) I can see no reason why the law should not be the same with regard to a horse. It does not appear to me on examination of the cases that it is possible to say that because a horse is known to have the vice of biting other animals it is a dangerous animal for all purposes and should be treated accordingly. Mr. Samuels for the defendants urged that it was a matter of common knowledge that a horse might have the vice of attacking other horses whilst free from the vice of attacking mankind. No one was

(1) [1912] 3 K. B. 199. (2) [1913] 3 K. B. 629.
(3) [1896] 2 Q. B. 109.

called to say this, nor, on the other hand, to say that horses which bite horses also bite mankind. Had such evidence been called the jury would have been entitled to find accordingly; but in the absence of such evidence I do not think they can. Common knowledge is referred to in more than one of these animal cases, in particular in *Osborne* v. *Chocqueel* (1) and *Manton* v. *Brocklebank* (2), in which there is an important pronouncement on the subject. In that case a mare was put into a field where there was a horse belonging to the plaintiff, and the plaintiff was not told. The mare kicked the horse, and the horse had to be destroyed. No scienter was proved in evidence, but it was found by the county court judge that (3) 'when a horse is turned out to grass . . . . among other strange horses, and injures one of them, it is not necessary for the owner of the injured animal to prove scienter, it being natural to all horses in such circumstances to kick and bite each other in play as well as in quarrel.' That finding of the county court judge was upheld in the Divisional Court (Darling and Salter JJ.), and the case went to the Court of Appeal, which reversed the decision of the Divisional Court. On the question of common knowledge Lord Sterndale M.R. said (4): 'There is, however, another contention adopted by Salter J., and I am inclined to think by Darling J. also, which seems to me to present more difficulty. It is that the case falls within the principle of *Fletcher* v. *Rylands* (5) and that the defendant is liable on that principle. This is grounded on the finding of the deputy county court judge which I have already read—i.e., that it is natural in all horses in such circumstances to kick and bite each other in play as well as in quarrel. . . . . I cannot see that there was any evidence given at the trial to support such a broad proposition.' Then he deals with two other cases (6) which he says do not appear to him to establish the proposition stated by the deputy county court judge, and

(1) [1896] 2 Q. B. 109.
(2) [1923] 2 K. B. 212.
(3) Ibid. 213.
(4) Ibid. 221.
(5) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.
(6) *Lee* v. *Riley* (1865) 18 C. B. (N. S.) 722 and *Ellis* v. *Loftus Iron Co.* (1874) L. R. 10 C. P. 10.

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goes on: 'I assume, however, that he acted, as did Darling and Salter JJ., upon common knowledge of which the Court must take notice. With respect, I think this is rather dangerous. There may be facts of such public notoriety that a Court is bound to take notice of them, but the experience of different judges may well lead them to different conclusions as to the habits of horses, and I do not rely on any experience of my own.' I wish to associate myself with that pronouncement. I come to the conclusion, therefore, that notwithstanding the findings of the jury, the defendants are entitled to judgment."

The plaintiff appealed.

F. G. Paterson for the plaintiff. The county court judge was wrong in holding that there was no evidence to support the jury's finding of scienter. The defendants knew that the horse had vicious propensities, and was therefore exceptional and out of its class, and, being a dangerous animal, they kept it at their peril on the principle of *Fletcher* v. *Rylands*. (1) The question was entirely for the jury, who ought only to have been asked to say whether the horse was of vicious propensities and to the knowledge of the defendants. On their findings the plaintiff was entitled to judgment.

[He referred to Beven on Negligence, 3rd ed., vol. i., p. 519.]

[*Jones* v. *Perry* (2); *Cox* v. *Burbidge* (3); *Bradley* v. *Wallaces, Ld.* (4); and *Manton* v. *Brocklebank* (5) were also referred to.]

H. D. Samuels for the defendants was not called upon to argue.

SCRUTTON L.J. This case raises an interesting point and has been very well argued. The facts are quite short. The plaintiff was crossing Ludgate Hill, and as he was doing so the defendants' horse tried to bite him. It had a muzzle on, but in spite of this its teeth came into contact with the plaintiff's face and injured it. The county court judge asked

(1) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.
(2) (1795) 2 Esp. 482.
(3) 13 C. B. (N. S.) 430.
(4) [1913] 3 K. B. 629.
(5) [1923] 2 K. B. 212.

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the jury the following questions: (1.) Did the defendants know, or ought they to have known, that the horse was (*a*) dangerous to other horses? Yes. (*b*) dangerous to mankind? Yes. (2.) Was the injury to the plaintiff caused by the dangerous nature of the horse? Yes. (3.) Were the defendants in the circumstances negligent in leaving the horse unattended? Yes. No evidence was adduced to show that horses which bite other horses are inclined to bite mankind, and I entirely agree that it is not safe for judges to act on their own knowledge, though some judges know a great deal about horses. As I understand it counsel for the appellant bases his argument on this line of thought. When once it is known that a particular animal is different in any one respect from its kind then that animal is dangerous, and in accordance with the principles of *Fletcher* v. *Rylands* (1) the owner keeps it at his own risk, and is liable if it injures any one; and in the present case the defendants' horse, as they knew, differed from its kind in that it was addicted to biting other horses. I am not aware of any case which justifies the proposition that if one knows that an animal is dangerous in any one respect one is liable if it prove dangerous in another respect. I put to counsel the case of a horse kicking a motor car, a thing its species does not ordinarily do. Could that be held to be evidence of scienter of a tendency to bite human beings? I find no authority which supports that view. I think the point was dealt with by the Court of Appeal in *Manton* v. *Brocklebank* (2), where Atkin L.J. said: "The owner of a dog is not liable for its trespass and damage without proof of scienter of a special mischievous propensity to do such damage." The words to be emphasized in that passage are "to do such damage," which are not "to do other damage," and it appears to me that Atkin L.J. has exactly defined the kind of scienter that must be proved. Therefore I think that the finding that the defendants knew that the horse was accustomed to bite horses does not impose liability on them under the doctrine of *Fletcher* v. *Rylands* (1),

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(2) [1923] 2 K. B. 212, 231.

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which is based on a different principle, and I am of opinion that the appeal should be dismissed.

SARGANT L.J. I agree, and am content to adopt the judgment of the learned county court judge. (1)

Appeal dismissed.

Solicitor for plaintiff: *Malcolm A. Pritchard.*
Solicitors for defendants: *Berrymans.*

W. L. L. B.

1927
Dec. 14, 15.

COMMISSIONERS OF INLAND REVENUE *v.* HAWLEY.

Revenue—Super Tax—Specific Legacy—Dividend on Shares—Executor's Assent—Relation of Assent—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 5, *sub-s.* 3 (*c*).

Under the will of his father, who died on August 19, 1921, the respondent was entitled to a specific legacy of certain shares in two limited companies. Owing to difficulties in administration the executors did not assent to the legacy until June, 1924, and in the meantime dividends had been declared upon the shares in February and August, 1923, and in March, 1924, which dividends were retained by the executors until their assent in June, 1924. The appellant was assessed to super tax upon these dividends for the years ending April 5, 1924, and April 5, 1925, respectively, on the basis that they were his income for the years when such dividends were payable by the companies. The respondent contended that as he was not in a position to require payment of the dividends from the executors until June, 1924, they were not his income or receivable by him until then, and that he was therefore wrongly assessed:—

Held, that the doctrine of relation of the executor's assent to the date of the death applied and that the respondent was rightly assessed.

CASE stated by Special Commissioners of Income Tax under Income Tax Act, 1918, s. 149.

On July 22, 1926, the Special Commissioners heard the appeal of the respondent against additional assessments to super tax in 904*l.* and 16,728*l.* respectively for the two years ended April 5, 1924, and April 5, 1925, and a first assessment in 3778*l.* to super tax for the year ended April 5, 1926,

(1) Ante, p. 572.

under the statutes relating to super tax. On August 19, 1922, the respondent's father died and by his will, which was duly proved, left to the respondent one-half of his holding in the ordinary and preference shares of Hawley & Johnson, Ld., and in the ordinary and preference shares of A. E. Hawley & Co., Ld., subject to certain provisions in favour of the testator's widow, which are not here material.

At his death the testator was indebted to A. E. Hawley & Co., Ld., in 35,580*l.* and to Hawley & Johnson, Ld., in 33,745*l.* for loans and advances made by these companies to him in his lifetime. Difficulties arose as regards the settlement of these debts, which it was necessary for the executors to pay off before assenting to or handing over any legacies. The only method by which the executors could pay off the debts was by selling a sufficient number of the shares in the two companies in question. Both companies were private companies and their shares were not quoted and had no available market. The transfer of ordinary shares was in each case restricted by the provisions of the articles of the respective companies. In these circumstances the executors endeavoured to arrange with the directors of the two companies, of whom the respondent was one, that they should purchase from the executors a sufficient number of the shares to provide the money to enable the executors to pay off the debts due from the estate. In June, 1924, this arrangement was completed and the executors then assented to the specific legacy of the shares to the respondent. In September, 1924, the executors transferred to the directors of the two companies the shares which they had bought under the above arrangement, and also transferred to the respondent the shares which were the subject of the specific legacy to him. In the meantime three dividends had been declared upon the shares of each company in February and August, 1923, and in March, 1924, and these dividends were retained by the companies and applied in part payment of the loans owing to them.

The settlement between the executors and the respondents was effected by selling a sufficient number of shares to pay off

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the testator's debts to the companies and to enable the executors to pay the respondent a sum equivalent to the amount of the dividends on the shares which formed the specific legacy to him, which dividends had been retained and applied by the companies in the manner stated. On behalf of the respondent it was contended that the dividends in question were not his income or receivable by him until the settlement effected by the executors in June, 1924, when the executors assented to the legacy. On behalf of the appellants it was contended that the dividends in question were income of the respondent in the years when such dividends were respectively payable by the companies.

The Commissioners held that the respondent was not in a position to enforce his claim to or to require payment of the dividends before June, 1924, and that they were not receivable by him until then. They amended the assessments accordingly, but stated this case for the opinion of the High Court at the request of the appellants.

Sir Douglas Hogg A.-G., *J. H. Stamp* and *R. P. Hills* for the Crown. When the executor gives his assent to a specific legacy the assent relates to the death of the testator, and the legatee is entitled to the profits and is liable for expenses connected with the legacy as from the death: *In re Pearce*, (1); *In re West* (2); Williams on Executors, 11th ed., p. 1107.

Upon the executors' assent being given, the specific legacy is separated from the general estate, and both the corpus of the legacy and the produce belong to the legatee as from the death. The fact that the executors here applied the dividends on these shares towards the payment of moneys owed by the testator to the companies does not affect this principle. The dividends declared for the two years between the death and the executors' assent are therefore the income of the respondent for the respective years in which they were declared and paid by the companies to the specific legatee or to the executors for him. *Barnardo's Homes* v. *Special*

(1) [1909] 1 Ch. 819. (2) [1909] 2 Ch. 180.

Income Tax Commissioners (1) has no application here, because it concerned a gift of residue. Lord Finlay said in his judgment in that case: "The doctrine of relation, however, which applies to specific legacies is not applicable to the bequest of a residue as the residue only comes into existence when the administration is completed."

The dividends are income of the respondent and for the purposes of tax must be spread over the years in respect of which they were paid and not accumulated up to the year when the executors actually assented to the legacy: *Hawley* v. *Inland Revenue Commissioners.* (2) Had the executors assented immediately on the death, the dividends would have belonged to the respondent, and by the doctrine of relation, the respondent is in the same position as if he had had the shares as from the death.

[They cited also *Inland Revenue Commissioners* v. *Earl of Haddington* (3) and *Leigh* v. *Inland Revenue Commissioners.* (4)

Latter K.C. and *Bremmer* for the respondent. We admit the doctrine of relation, but the question here is not as to the rights of the respondent to these dividends, but as to the exact years for which they constituted his "income." Until 1924 the dividends were in the hands of the executors and could have been applied by them in discharge of the testator's debts.

In *Leigh* v. *Inland Revenue Commissioners* (4) it was held that arrears of interest paid by the company in 1921 were income for that year, and therefore under s. 5, sub-s. (*c*), of the Income Tax Act, 1918, were assessable to super tax for the following year. Here similarly the dividends only became the respondent's income in the year in which the executors gave their assent to the legacy. Neither *Barnardo's Homes* v. *Special Income Tax Commissioners* (5) nor *Inland Revenue Commissioners* v. *Earl of Haddington* (3) throw any light upon this case.

There is no authority for the proposition that before income is vested in the recipient it is taxable as income. There must

(1) [1921] 2 A. C. 1, 8.
(2) (1925) 9 Tax Cas. 331.
(3) (1924) 8 Tax Cas. 711.
(4) Ante, p. 73.
(5) [1921] 2 A. C. 1.

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be (1.) taxable income, and (2.) actual receipt. In *St. Lucia Usines and Estates Co.* v. *Colonial Treasurer of St. Lucia* (1), where interest upon unpaid purchase money from the sale of real property was due to the appellants in 1921, but was not paid, it was held that this was not " income arising or accruing in 1921 " and that they were not liable to pay tax for that year. The income here arising from these shares during the two years in question, whether it was vested or contingent, so far as it was accumulated by the trustees, did not form part of his income for tax purposes during those respective years: *Inland Revenue Commissioners* v. *Blackwell.* (2)

Stamp in reply. The respondents' right to the dividends was not contingent. It was vested and existed as from the death. By s. 5, sub-s. 3 (*c*) of the Income Tax Act, 1918, the income " chargeable " is deemed to be income of the year in which it is " receivable " and deductions are to be allowed as deductions " in respect of the year in which they are payable." The two things—income and deductions—are correlative. The antithesis between the words " paid " and income " payable " in the sub-section is clear, and income " receivable " must be treated in the same way.

In the *St. Lucia Usines and Estates Co.* v. *St. Lucia* (*Colonial Treasurer*) (1) the interest was not income because it was never in fact received.

ROWLATT J. In this case the respondent was specific legatee under his father's will of certain shares in two private companies. The father died on August 19, 1922, and the will was duly proved. The testator owed large sums of money to the two companies for loans and advances made to him during his life. His executors found a difficulty in paying off these loans and in consequence of this they did not assent to the specific legacy until June, 1924, when the respondent became entitled and took the legal rights to the shares as from the testator's death. In the meantime dividends had accrued upon the shares in 1923 and 1924, which were payable

(1) [1924] A. C. 508.
(2) [1924] 2 K. B. 351; on appeal [1926] 1 K. B. 389.

to the executors as legal owners before the date of the assent. They were not in fact paid, because the companies retained them in part repayment of the loans owing to them from the testator. They were, however, accounted for by the executors when their assent was given to the legacy. The question is whether the dividends are to be treated as the respondents' income for the years when they accrued and were payable, or whether they must be regarded as income for the year when the assent was given by the executors to the legacy. The doctrine of relation of the assent to the death of the testator is complete and has effect for most purposes. But that does not conclude this question, because here the taxation is in respect of a particular period of time and in respect of events happening within the limits of that period. Did this income accrue within that time or not? It does not follow that for the purpose of answering that question the doctrine of relation goes far enough. The shares were left to the respondent as a specific legacy, and from the date of the death and before assent they were his property, subject to the right of the executors to keep control of them for the purpose, if necessary, of paying the testator's debts, and for this purpose they had the legal title. Counsel for the Crown put the matter in that way, and I think it substantially describes the position. I do not think that *Barnardo's Homes* v. *Special Income Tax Commissioners* (1) is of any help here. In that case the Court was concerned with a gift of residue and therefore the doctrine of relation did not arise. That decision does not throw any light on the exact time at which the legatee must be held to have received the dividends. Here the income was paid or allowed to the respondent or to the executors as trustees for him. These sums, being income, must not be regarded as having accrued as an accumulated sum at the time the assent was given.

The doctrine of relation applies and impresses the dividends that have accrued and been paid in the meantime with the character of income. They must, therefore, be treated as having belonged to the specific legatee all the time, although they were

(1) [1921] 2 A. C. 1.

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in fact received by the executors. In my view the dividends belonged to the respondent in the respective years when they were paid to the executors, and the appeal of the Crown must be allowed.

Appeal allowed.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Vizard, Oldham & Co., for Owston & Co., Leicester.*

F. P. F.

1927
Dec. 2.
1928
Jan. 13.

ARNOLD AND WEAVER *v.* AMARI.

[1927. A. 1932.]

Husband and Wife—Divorce Suit by Husband—Decree against Wife—Wife's Costs as Respondent—"Necessaries"—Agency of Necessity—Liability of Husband to Wife's Solicitors for Costs.

A husband took divorce proceedings against his wife on the ground of her adultery. She consulted a solicitor, who upon her instructions put in a defence denying the charge and briefed counsel to appear for her. At the hearing the wife failed to appear and a decree was made against her dissolving the marriage on the grounds alleged in the petition. The wife's counsel applied for costs, but as no security for her costs had been obtained, no costs were granted. The wife's solicitor brought an action in the King's Bench Division to recover the costs from the husband, on the ground of his wife's agency of necessity at common law. Sankey J. found as a fact that the solicitor had acted without negligence, honestly believing that the wife was innocent and that she would be successful in her defence:—

Held, that in these circumstances the wife had no authority to bind her husband, so as to make him liable for the costs of her defence to his petition for divorce.

Dicta of Scrutton and Atkin L.JJ. in *Durnford* v. *Baker* [1924] 2 K. B. 587 considered.

ACTION before Sankey J. without a jury.

The plaintiffs in this action claimed 61*l.* 17*s.* 6*d.* by specially indorsed writ for work done and moneys expended by them as solicitors in divorce proceedings instituted by the defendant against his wife, for whom they acted.

The following statement of facts and finding thereon is taken from the judgment of Sankey J. :—

"The defendant in this case took proceedings against his wife for divorce, alleging two acts of adultery with a boy of about the age of sixteen years. In November, 1926, after the wife was threatened with proceedings, she consulted and retained the present plaintiffs as her solicitors. They made full inquiry into the matter, satisfied themselves of her innocence and obtained evidence on her behalf. On April 7, 1927, the plaintiffs received a copy of a letter which the wife had written to the husband saying she did not intend to defend the suit for the sake of the child. At that time all the costs with the exception of a few pounds had been incurred. The solicitors inquired of the wife why she wrote the letter, and she told him that she did not admit the adultery, but that her husband had urged her to give up the defence and said he would make provision for her. The solicitor thereupon continued the defence. He attended on May 12, the day of the hearing, with counsel on behalf of the wife and expected to find her there, but she failed to appear. As a consequence the suit was undefended. The petitioner and co-respondent were called and satisfied the learned President of the adultery and he pronounced in favour of the husband. The wife's counsel applied for costs, but unfortunately owing to an error of the London agents no security had been obtained from the husband for the wife's costs and the President refused to grant costs, saying he would leave the wife's solicitors to their remedy (if any) at common law. The present action was then brought against the husband to recover the costs, on the ground that the wife had his authority to incur them.

Two points were taken for the defendant: (1.) that the plaintiffs must have known, or ought to have known, that the wife was not an innocent party; (2.) that in law the action is not maintainable.

As to the first point I am in favour of the plaintiffs. I have seen Mr. Weaver of the plaintiff firm in the box and I accept his evidence. I find that the plaintiffs did not know

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that the wife had committed adultery, that they were in no way negligent, and that they honestly believed the wife was innocent and that she would be successful in her defence. They attended on the day of hearing and were surprised not to find her there. They had conducted the litigation properly, had fairly investigated the charges, and had a reasonable foundation for the defence."

P. B. Morle for the plaintiffs.
Robert Fortune for the defendant.
The arguments are sufficiently set forth in the judgment.

1928. Jan. 13. SANKEY J. [after reading the above statement of fact and finding thereon continued:] The second point therefore emerges: Can a wife in these circumstances bind her husband to pay her solicitor's costs of divorce proceedings in which a divorce is granted against her? It was conceded that she committed adultery with the boy before she instructed the plaintiffs.

The case of *Durnford* v. *Baker* (1) decides that a solicitor, who appears on behalf of a wife living in adultery in an action brought by her, cannot recover costs incurred on her behalf against her husband, but the present point, that is, where the wife is the defendant in the case, was expressly left open by the Court of Appeal. The question is really one of the law of agency. It may be stated in general terms that a wife living with her husband binds him by a contract made for necessaries, whereas a wife living apart from her husband and who has committed adultery does not bind him. But can a wife bind her husband so as to make him liable for the costs of a solicitor whom she employs to defend her against proceedings taken by her husband for a divorce, on the ground of her adultery, where the adultery has admittedly been committed?

Now the solicitor is not left unprotected or at risk, because he can always apply to the Divorce Court for security for costs and so he is not left at any risk; indeed, *Franklin* v.

(1) [1924] 2 K. B. 587, 600, 601.

Franklin (1) shows that the Divorce Court will grant costs where the amount secured is not sufficient to meet the sum expended. This, however, is a jurisdiction peculiar to that Court and does not alter the rights, whatever they may be, at common law.

The question remains, can the solicitor in the present facts, get judgment for his costs against the husband? The point was left open in *Durnford* v. *Baker* (2), for Scrutton L.J. there said: "There may be—and in the authorities there is some ground for thinking that there may be, an exception where the wife is defending herself against proceedings brought by the husband." In the same case (2) Atkin L.J. said: "Nothing we have said has any bearing on the rules of law and practice as to costs in the Divorce Division. The practice of that division depends on the discretion of the Court, and it may be that the judge, in the exercise of that discretion, will give costs in relief of a wife who has been guilty of adultery. That has nothing to do with the common law rule as to a wife's agency of necessity. I should like to reserve the point whether the rule is subject to an exception in the case of a guilty wife called upon to defend herself against proceedings brought by the husband. We have had no authority cited to us: it may be that even in that case her solicitor would have to defend in reliance on the Court's exercise of discretion." The only cases referred to bearing upon the point seem to be *Otway* v. *Otway* (3), and possibly *Holt* v. *Holt.* (4) It will be observed, however, that both those cases arose in the Divorce Court, where the matter, as already pointed out, is governed by the peculiar practice of that Court, and Cotton L.J. in giving judgment in the Court of Appeal in *Otway* v. *Otway* (3) says: "Although the wife's adultery prevented her from pledging the credit of her husband, and prevented her getting any alimony or allowance from the husband, yet, in my opinion, it does not prevent her from requiring her husband to provide for the costs reasonably incurred in bringing her case against his appeal

(1) [1921] P. 407.
(2) [1924] 2 K. B. 587, 600, 601.
(3) (1888) 13 P. D. 141, 155.
(4) (1858) 28 L. J. (P. & M.) 12.

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Sankey J.

before the Court. Therefore I think we ought to allow her costs of this appeal, as well as the costs of the proceedings in the Divorce Court."

In both those cases the Court was exercising its undoubted discretion as to costs when sitting as a Court of Divorce and was not depending upon the mere common law; indeed as I have pointed out Cotton L.J. rather suggested that her adultery prevented her pledging the credit of her husband in the matter of costs. Neither can I dismiss from my consideration that the learned President in the present case refused to exercise his discretion, although that is not germane on the question of the common law liability.

In these circumstances I can see no authority which compels me to hold that the wife is entitled to pledge her husband's credit and to bind him to pay her solicitor's costs in circumstances such as the present. The solicitor is not without remedy or indeed at risk in such cases, and had he, at the beginning, obtained an order in the Divorce Court for the wife's costs, which is granted almost as of course, he would not be in his present unfortunate position.

It is not necessary to relax what I conceive to be the common law rule in order to do justice in such a case as this, but, if it is a proper thing to do so, I think that any such relaxation of and exception to the common law should be made by the Court of Appeal rather than by a judge of first instance.

For these reasons I am of opinion that judgment must be given for the defendant.

Judgment for defendant.

Solicitors for plaintiffs: *Church, Adams, Tatham & Co., for Matthew Arnold & Weaver, Watford.*

Solicitors for defendant: *Langford, Borrowdale & Thain.*

F. P. F.

GOOLE AND HULL STEAM TOWING COMPANY, LIMITED *v.* OCEAN MARINE INSURANCE COMPANY, LIMITED.

1927
Dec. 5, 6.

[1927. G. 696.]

Marine Insurance—Valued Policy—Collision—Partial Loss—Subrogation of Underwriters on Payment—Average Adjustment—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 79.

A ship was insured by her owners with underwriters on an agreed value of 4000*l.* In a collision with another ship she was damaged and the cost of repairing her was 5000*l.* Her owners recovered 2500*l.* from the other ship in respect of the loss upon the footing that both ships were equally to blame. They then claimed to recover 2500*l.* from the underwriters on the policy.

The underwriters contended that as the limit of liability was 4000*l.*, and 2500*l.* had already been recovered, the amount due from them should not exceed 1500*l.*:—

Held, that by the Marine Insurance Act, 1906, s. 79, sub-s. 2, the underwriters were entitled to the full benefit of the 2500*l.* previously recovered by the owners, and that as the agreed value of the ship was 4000*l.*, their liability was for 1500*l.* only.

North of England Iron Steamship Insurance Association v. *Armstrong* (1870) L. R. 5 Q. B. 244 and *Thames and Mersey Marine Insurance Co.* v. *British and Chilian Steamship Co.* [1915] 2 K. B. 214 applied.

Judgment of Cockburn C.J. in *North of England Iron Steamship Insurance Association* v. *Armstrong* (supra) considered.

Action without pleadings before MacKinnon J.

By a policy of marine insurance dated June 5, 1924, the defendants insured the plaintiffs' ship *Goole*, valued at 4000*l.* (2500*l.* as to hull and materials and 1500*l.* as to engines and machinery), against the usual marine risks to the extent of 535*l.*, the policy to run for twelve months from May 31, 1924, to May 31, 1925. The balance of the 4000*l.* was insured with other underwriters. The policy was issued subject to the Institute Time Clauses annexed thereto.

On January 21, 1925, while on a voyage up the Thames the *Goole* came into collision with the ship *Delphinus* and was damaged. The cost of her repair was 5000*l.*, and a collision action brought by the plaintiffs against the owners of the *Delphinus* in the Admiralty Division was settled upon the basis of "both equally to blame." In December, 1925,

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GOOLE AND HULL STEAM TOWING CO. v. OCEAN MARINE INSURANCE CO.

the owners of the *Delphinus* paid over 2500*l.* to the plaintiffs, who handed the documents to a firm of average adjusters for the purpose of ascertaining the owners' loss and of adjusting the claims upon the underwriters.

The plaintiffs contended that the sum of 2500*l.* recovered for the *Delphinus* should be deducted from 5000*l.*, the cost of repairs, and that as the resulting 2500*l.* was less than the value stated in the policy—namely, 4000*l.*—they were entitled to recover that sum.

The defendants contended that as the limit of liability stated in the policy was 4000*l.* and 2500*l.* had already been recovered from the *Delphinus*, the amount due from the underwriters was 1500*l.*

The case came before the Court without pleadings and upon an agreed statement of facts.

Raeburn K.C. and *Sir Robert Aske* for the plaintiffs. The proper basis of adjustment is to find the difference between the amount recovered from the other ship and the actual cost of the repairs. That amount is 2500*l.*, and inasmuch as it is less than 4000*l.*, which was the total insured value of the ship, the plaintiffs are entitled to recover the full 2500*l.* from the underwriters. Otherwise they will not be "indemnified," and it is only "in so far as the assured has been indemnified" that the Marine Insurance Act, 1906, s. 79, sub-s. 2, applies, so as to subrogate the insurer to all rights of the insured in the event of a partial loss: *Burnand* v. *Rodocanachi*. (1) Subrogation, apart from abandonment, can never entitle the insurer to enforce for his own benefit the claims of the insured, except so far as is necessary to reimburse him for his payment under his contract: Arnould on Marine Insurance, 11th ed., vol. ii., ss. 1228–1230. *North of England Iron Steamship Insurance Association* v. *Armstrong* (2) was a case of total loss. The principles laid down in the judgments in that case are not easy to reconcile with those on which *Steamship Balmoral Co.* v. *Marten* (3) was decided by the

(1) (1882) 7 App. Cas. 333. (2) L. R. 5 Q. B. 244, 249.
(3) [1902] A. C. 511.

House of Lords. The decision was however followed in *Thames and Mersey Marine Insurance Co.* v. *British and Chilian Steamship Co.* (1) In the judgment of Cockburn C.J. (2) the passage occurs : "Though it certainly startles one a little, that the underwriters who have only paid 6000*l.*, the estimated value as stated in the policy and agreed upon between the parties, shall if the vessel should prove to be equal to that 6000*l.*, or worth more, get all that can be recovered in respect of the loss of the vessel, yet still, I think that is an incident which arises from this novel form of policy in which the value of the vessel is taken at a fixed sum as agreed upon between the parties." This and similar passages appear to be contrary to the principle of the law of subrogation, the sole object of which is to prevent the assured from recovering more than a full indemnity. Upon another method of adjustment the 2500*l.* recovered from the *Delphinus* should be apportioned between the owners and the underwriters, the owners taking one-fifth and the underwriters four-fifths upon the proportion between the insured value, 4000*l.*, and the cost of repairs, 5000*l.* On this basis the underwriters would take 2000*l.* and be liable to the assured for the remaining 2000*l.*

Miller K.C. and *Mitchison* for the defendants. The underwriters are only liable to pay the difference between the amount recovered from the *Delphinus* and the insured value, 4000*l.* The underwriters are entitled to be subrogated for the whole sum which the assured has recovered from the *Delphinus* in respect of damage.

It is true that the effect of this will be that the plaintiffs will not be fully indemnified for their expenditure, but they will be indemnified in accordance with their contract and as laid down by the Marine Insurance Act, 1906, s. 69. As regards the insurers, the plaintiffs have been indemnified as is provided in the Marine Insurance Act, 1906, s. 79, sub-s. 2, "according to this Act," that is to say, for the whole of the particular average damage sustained, and therefore the insurers are subrogated to all the remedies of the assured in

(1) [1915] 2 K. B. 214. (2) L. R. 5 Q. B. 244, 249.

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respect of that loss. This point is directly covered by the decision in *North of England Iron Steamship Insurance Association* v. *Armstrong* (1), which was followed in *Thames and Mersey Marine Insurance Co.* v. *British and Chilian Steamship Co.* (2), and the view now put forward follows logically from those cases.

Raeburn K.C. in reply.

MACKINNON J. This case, while it involves some elementary principles of marine insurance, raises an interesting question of average adjustment. The question in the case ought logically to be: What have the parties agreed by the policy which is their bargain? But the time has long gone past when one can construe a policy otherwise than in the light of the innumerable cases which are now crystallized in the Marine Insurance Act, 1906, as laying down the rules of construction for policies in the ordinary terms.

The plaintiffs owned a tug, which was insured by the defendants for 535*l.* upon a valuation of 4000*l.* There were other underwriters for the balance of the 4000*l.* not covered by the defendants, but if that balance had not been wholly underwritten by others, the plaintiffs under the Marine Insurance Act, 1906, s. 81, would be deemed to be their own insurers in respect of the uninsured balance, and their share of any insurable liability, or their share of any credit which decreased any insurable liability, would be exactly the same as that of any of the other underwriters.

The insured vessel suffered a partial loss by way of particular average damage, and, in respect of such a partial loss the underwriters in proportion to their subscriptions under s. 69 were liable for the reasonable cost of repairing the damage, but not exceeding the sum insured. If the insured in fact spends as a reasonable cost of repairs more than the insured amount of 4000*l.*, then that excess he has to bear himself, not as a sum in respect of which he is his own insurer under s. 81, but as an expenditure by him outside any insurance calculation at all. In this case

(1) L. R. 5 Q. B. 244. (2) [1915] 2 K. B. 214.

the assured did spend more than 4000*l.* The case has been discussed upon hypothetical figures, which raise the point of principle, and I propose to deal with it in the light of those figures. If we take the expenditure on repairs as 5000*l.*, the assured have a claim prima facie upon the underwriters for their proportion of 4000*l.*, and no more. The extra 1000*l.* is a sum outside any insurance calculation.

As it happened, the particular average damage was caused by collision with another ship, and accordingly the assured brought an action against the owners of the other ship to recover damages; that action was settled on the basis of "both to blame." In the reference before the registrar the amount expended on repairs was proved as 5000*l.* That was accepted as a reasonable expenditure, and accordingly the assured was allowed in his decree 50 per cent. on the "both to blame" basis—namely, 2500*l.*

The question in this case is: How does it affect the claim which the assured would otherwise have on the underwriters for 4000*l.* that he has already received 2500*l.* from the owners of the other ship? If the underwriters had already paid the 4000*l.*, the question would arise in the guise of an inquiry: to how much are the underwriters entitled by subrogation? If the underwriters have not paid the 4000*l.*, then the question arises in a slightly different form as to the amount for which the assured must give credit against his claim as indemnifications aliunde; but the principle involved in either aspect of the case must be exactly the same.

The assured say the true principle on which this calculation is to be dealt with is this: "We have spent 5000*l.* on repairs, we have received 2500*l.* from the owners of the other ship, we are therefore 2500*l.* out of pocket, and that 2500*l.* being less than 4000*l.*, we can claim in full from the underwriters." On the other hand, the underwriters say: "For this particular average damage to your ship we are primarily liable for 4000*l.* and no more; you have in respect of that particular average damage received 2500*l.*, paid to you by the owners of the other ship; therefore we, the underwriters, are only liable for the difference—namely, 1500*l.*; the extra 1000*l.*

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that you have spent on repairs is outside any insurance calculation altogether." Those are the main contentions.

There is a third intermediate basis which has been suggested. I thought at an earlier stage that it did not find much favour with either side, but Mr. Raeburn assures me in his reply that he does rely upon it, if he is not right in his main contention, and desires to press it; on that basis the 2500*l.*, it is suggested, should be apportioned so as to give the underwriters 2000*l.* in respect of their 4000*l.*, and the assured 500*l.* in respect of their 1000*l.*, so that the net recovery from the underwriters would be 2000*l.* I will not discuss it at any length, but I can see no possible legal basis for this third suggested method. The real question in this case is: Which of the two main contentions that I first described is the correct one?

I think the contention of the underwriters is correct. A marine insurance policy is often said to be a contract of indemnity, but it must always be remembered that it is not a contract of indemnity ideally, but of an indemnity according to the conventional terms of the bargain. When a loss has happened the question is hardly ever: How much is the assured out of pocket? That might be the proper question if the object of the contract was to provide an ideal indemnity. The real question in any case is: What is the measure of indemnity that by the convention of the parties has been promised to the assured? That may in some cases be less than an ideal pecuniary indemnity, in some cases it may be more. If the assured has undervalued his ship in the valuation he has agreed upon, he may find that he has suffered pecuniary loss outside the agreed indemnity. That happened very strikingly in the *Steamship Balmoral Co.* v. *Marten.* (1) Theoretically the same result might arise upon an unvalued policy, because by the convention of the policy the insurable value of the vessel under s. 16 is the value at the commencement of the risk, and you might have some general average liability at the end of a long voyage when the market value of the ship, owing to change of conditions, had increased. Again by the terms

(1) [1902] A. C. 511.

of the bargain, as interpreted in the cases and the Act, the insurable interest in freight allows the gross freight to be insured. That again is laid down in s. 16, and obviously if freight is lost at an early stage of a long voyage, the assured recovers a great deal more than he ought to upon any ideal pecuniary estimation of loss. When a partial loss occurs, there are various conventional bases for ascertaining the measure of indemnity that is promised. In the case of goods, you have to find the proportion of the damaged value to the sound value of the goods and apply that to the insured value, or the insurable value. That again may well result in an artificial indemnity, differing from the real pecuniary loss to the assured. For instance if, as may well be, the valuation includes freight payable at destination, and the particular average loss of goods in question is a total loss of part of the insured goods in the course of the voyage, upon them no freight would have to be paid, and to that extent in recovering the insured value of those goods the assured would be making an actual profit: that is to say, there is an artificial measure of indemnity which differs from the real loss.

As regards partial loss of ship by particular average loss, the convention is that you are to estimate the depreciation not in the way that depreciation is estimated in the case of goods, because it is impracticable; but you are to ascertain the depreciation in terms of the cost of repairs. The assured need not actually do the repairs; if he does not do them, then you are to estimate the cost, instead of taking what he spent upon them. Accordingly, as is laid down in s. 69, he is entitled in respect of such particular average loss to the reasonable cost of repairs not exceeding the sum insured in respect of any one casualty. When the underwriters, in respect of a particular average loss, have paid the assured the indemnity agreed under this provision, that is to say the cost of repairs not exceeding the insured amount, in this case 4000*l.*, they are entitled to say: "We have paid the agreed indemnity for the whole of the particular average loss you have sustained, and not merely for a part of it"; they are therefore entitled to be subrogated, or to take credit,

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for the whole sum which the assured may recover from a third party in respect of that particular average damage and not for part of it only.

Now that conclusion seems to me to accord exactly with the provision in s. 79, which deals with the rights of subrogation. Sub-s. 2 of that section says: "Where the insurer pays for a partial loss"—I leave out immaterial words—"he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified. according to this Act, by such payment for the loss." The section does not say "indemnified ideally," so that every penny of pecuniary loss that he has sustained has been made good to him, but, "indemnified according to this Act." It is quite true in this case that the payment of 4000*l.* has not fully indemnified the assured for their expenditure of 5000*l.* on the repairs, but according to the bargain they have made under the policy they have been indemnified "according to this Act" for the whole of the particular average damage which they have sustained as promised under s. 69, and therefore, as they have been "according to this Act" fully indemnified for that particular average loss, the underwriters under s. 79 are entitled to all the rights and remedies of the assured in respect of that loss, because they have fully indemnified them for that loss.

It is a strange thing that this question appears never to have arisen precisely in the way in which it does in this case with regard to partial loss, but there are two well known cases: *North of England Iron Steamship Insurance Association* v. *Armstrong* (1) and *Thames and Mersey Marine Insurance Co.* v. *British and Chilian Steamship Co.* (2) In those cases the underwriters had for total loss paid the agreed valuations, and therefore according to the Act, and by the convention of their bargain, they had fully indemnified the assured for the total loss of his ship. It was held that in consequence the underwriters were entitled to

(1) L. R. 5 Q. B. 244. (2) [1915] 2 K. B. 214.

all that the assured recovered from third parties in respect of that total loss, and that the assured was not entitled to go behind the conventional state of things for the purpose of showing that on the true value of the ship he had not received a full indemnity, but was still out of pocket.

The principle of those cases seems to me to be directly applicable in this case, unless it can be made out that there is some material and very striking difference between the result in the case of a total loss and of a partial loss. I do not think there is any such difference. The rights of underwriters as regards subrogation seem to me to be quite properly laid down in s. 79 in two sub-sections, one dealing with a total loss, and the other dealing with a partial loss. The two sub-sections are in identical terms, with one exception—namely, that in the case of a total loss there is, but in the case of a partial loss there is not, cession of the property in the thing insured to the underwriters. Thus s. 79, sub-s. 2, provides: "Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated"; and then the section goes on in the identical words which have been laid down in respect of his rights upon a total loss, there being added in the case of total loss the fact that the underwriter does become entitled to the property in the thing insured. That difference between the two cases cannot possibly, in my view, make any difference as regards the right in this case of the underwriters to the full 2500*l.* as compared with the right of the underwriters if there had been a total loss to the full sum recovered by the assured.

In one of those cases, *North of England Iron Steamship Insurance Association* v. *Armstrong* (1) it has been thought that there was a suggestion by Cockburn C.J. that supposing the assured recovered more than the sum that had been paid by the underwriters, the underwriters could claim the total sum and so make a profit. If Cockburn C.J. did mean that, it really depends upon the presence of three words, "or worth more," on p. 249 of the report. On the

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assumption that he did say that, the decision has been to some extent criticized in subsequent cases and in text-books. I do not desire to express any opinion whether that is right or wrong with regard to a total loss; it may be that it is right, but I think it can only be right if it rests upon the cession of property to the underwriter upon payment for a total loss. Therefore, supposing in this case the collision suit had not been settled on the terms of "both to blame," but had either been decided or settled upon the terms that the other ship, the *Delphinus*, was wholly to blame, and suppose the assured had recovered his full 5000*l.*, then I think the underwriters would not be entitled to claim 5000*l.*, but only 4000*l.*, to wipe out their payment or liability.

That question however would only become material if I accepted the further contention of Mr. Miller. He suggested that the working out of the salvage for the underwriters ought to be done upon the basis of separating the valuations. The actual valuation which I have so far spoken of as 4000*l.* is in the following terms: "Hull and material valued at 2500*l.*; engines and machinery, 1500*l.*; total, 4000*l.*" The suggestion of Mr. Miller is: Supposing this 5000*l.* paid by the owners of the ship was paid only as regards, say, 200*l.* or 300*l.* in respect of engines and machinery, and all the balance of it in respect of hull and materials, then it may result in the underwriters getting rather more than they would if the 2500*l.* is treated as paid only in respect of the valuation of 4000*l.* But the only purpose of the division of the valuation is to give an opportunity for the operation of the clause in the policy: "Average payable on each valuation separately or on the whole." I am quite satisfied that that confers an option on the assured as to whether he will claim average on each valuation separately, or on the whole, and the underwriters have no right to rely upon that clause in the way suggested, or in any way.

Judgment for the defendants.

Solicitors for plaintiffs: *Holman, Fenwick & Willan.*

Solicitors for defendants: *Waltons & Co.*

F. P. F.

[IN THE COURT OF APPEAL.]

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Nov. 16 ; *Dec.* 16.

In re TILMANSTONE (KENT) COLLIERIES, LIMITED.

Mines—Working—Ancillary Rights for facilitating Working—"Carrying away" Minerals—Aerial Ropeway for conveyance of Minerals from Mine to Port—Ropeway crossing Railway Line—Jurisdiction of Railway and Canal Commission—Mines (Working Facilities and Support) Act, 1923 (13 & 14 *Geo.* 5, *c.* 20), *ss.* 1, 3.

In considering whether it is in the national interest to grant ancillary rights to facilitate the proper and efficient working of minerals under the Mines (Working Facilities and Support) Act, 1923, the Railway and Canal Commission is entitled to take into account not only difficulties which physically obstruct the getting and carrying away of minerals, but also economic difficulties which militate against their effective marketing.

The expressions "carrying away" in s. 1, sub-s. 2, and "conveyance of minerals" in s. 3, sub-s. 2 (*b*), of the Act are to be construed not in a technical sense, but broadly as entitling the person to whom ancillary rights are granted under the Act to transport the minerals from the land where they have been won for sale elsewhere.

The Railway and Canal Commission made an order granting to a colliery company the ancillary right under the Act to construct an aerial ropeway over the land of other persons from their colliery to Dover, a distance of seven miles, which would enable them to transport their minerals more cheaply and more conveniently than by other means :—

Held, that the Railway and Canal Commission had jurisdiction to make this order.

Decision of Railway and Canal Commission affirmed.

APPEAL from an order of the Railway and Canal Commission.

The Tilmanstone Collieries, Ld., who were lessees of coal at Tilmanstone, Kent, applied to the Railway and Canal Commission, under the Mines (Working Facilities and Support) Act, 1923 (1), for leave to construct an aerial ropeway, seven miles in length, by which they could convey their coal to

(1) Mines (Working Facilities and Support) Act, 1923, s. 1, provides that where there is danger of minerals being left permanently unworked, power may be granted to work those minerals.

Sub-s. 2 : "For the purposes of this Part of this Act, references to working minerals shall include references to working, carrying away, treating and converting minerals."

Sect. 3, sub-s. 1 : "Where any facility, right or privilege is required in order that minerals may be properly and conveniently worked by the person entitled to work the same, and the proper and efficient working of the minerals is unduly hampered by the inability or failure of that

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Dover, the nearest port. The cost of conveying the coal in this way was one shilling a ton less than the cost of sending it by the Southern Railway Company's railway. That railway company, whose line would be crossed at one point by the ropeway, opposed the application on the ground that the Railway and Canal Commission had no jurisdiction under the Act of 1923 to make such an order as was asked for. The East Kent Light Railway Company also objected. The objection was overruled, and the Railway and Canal Commission granted the colliery company's application "to erect, lay down, maintain and use an aerial ropeway" according to certain plans and on certain conditions.

The Southern Railway Company and the East Kent Light Railway Company appealed.

Sir John Simon K.C., *Tyldesley Jones K.C.* and *Bruce Thomas* for the Southern Railway Company. The Railway and Canal Commission had no jurisdiction to authorize the construction of an aerial ropeway in this case. Sect. 3 of the Mines (Working Facilities and Support) Act, 1923, empowers the granting of ancillary rights for facilitating the working

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person to obtain such right, facility, or privilege (hereinafter referred to as an ancillary right), such ancillary right may be conferred in the manner and subject to the provisions hereinafter appearing on the person having the right to work the minerals who is working or desirous of working them either by himself or through his lessees."

Sub-s. 2: "In particular, but without prejudice to the generality of the foregoing provision, such ancillary rights shall include:—

(*a*) A right to let down the surface;

(*b*) A right of air-way, shaft-way, or surface or underground wayleave, or other right for the purpose of access to or conveyance of minerals or the ventilation or drainage of the mines;

(*c*) A right to use and occupy the surface for the erection of washeries, coke ovens, railways, by-product works . . .

(*d*) A right to obtain a supply of water or other substances in connection with the working of minerals;

(*e*) A right to dispose of water or other liquid matter obtained from mines or any by-product works. . . . ."

Sect. 6, sub-s. 1, provides that where an application for facilities is referred to the Railway and Canal Commission, that tribunal, "if satisfied that the requirements of this Part of this Act are complied with in the case of the applicant, and that it is expedient in the national interest that the right applied for should be granted," may grant the right on such terms and conditions as it may think fit.

of minerals where their "proper and efficient working" is unduly hampered, but this right given to work minerals, which by s. 1, sub-s. 2, is to include "working, carrying away, treating and converting minerals," while it covers more than the right to detach coal from the seams, does not empower the person getting it to transport it beyond the limits of the property for the purpose of sale. The "carrying away" is complete when the coal is taken to a spot on the property where the lessee has complete control over it; thereafter the lessee embarks upon the very different process of disposing of it by sale. In other words, the Court can make an order to enable the physical difficulties of getting the coal to be overcome. All the sections are concerned with the efficient working of mines, not with the disposal of the coal obtained. The words "conveyance of minerals" in s. 3, sub-s. 2 (*b*), bear the same restricted meaning as "carrying away" in s. 1, sub-s. 2.

Secondly, the Court in considering an application for the grant of ancillary rights, is not entitled to have regard to economic considerations; it can only make an order to enable difficulties from the engineering point of view being overcome. Parliament has clearly recognized the difference between the working and the disposal by sale of minerals. This is seen by a reference to the Mining Industry Act, 1926, s. 1 of which speaks of "the more economical and efficient working, treating, or disposing of coal," but Part II. is headed "working facilities," nothing being there said as to the disposal of minerals.

The absence from the Act of 1923 of an incorporation of the Lands Clauses and the Railways Clauses Acts supports our view that Parliament could not have contemplated the authorization of such a work as that sanctioned by the Railway and Canal Commission as being within the competence of that tribunal. If a ropeway seven miles in length can be sanctioned, why not one across England?

They referred to *Earl of Cardigan* v. *Armitage* (1) and McSwinney on Mines, 5th ed., p. 284.

(1) (1823) 2 B. & C. 197.

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Arthur Moon, for the East Kent Light Railway Company, adopted the argument presented on behalf of the Southern Railway Company.

Sir Leslie Scott K.C., *Sir Arthur Colefax K.C.* and *Bamber* for the Tilmanstone Colliery Company. The Act of 1923, which is a novel type of legislation, confers powers which are usually conferred by private statutes. The essential object of the Act is to provide easy machinery for enabling coal, which otherwise would be left unworked, to be worked and made generally available, and, if necessary, to override rights of private property on paying compensation. In view of the extreme importance of preventing the mining industry being hampered, Parliament has decided that the Railway and Canal Commission may, if it is in the national interest to do so, grant facilities for working such coal and at a profit so that good wages should be paid. The Court has accordingly been given a wide discretion in the matter of granting facilities, but Parliament has relied upon this discretion being exercised properly and in the national interest. The construction of the Act of 1923 is accordingly to be approached with those considerations in mind, and that one of its main objects is the granting of ancillary rights for facilitating the working of minerals. It is said for the appellants that the ambit of s. 3 is to be confined within the limits to be ascertained by the proper interpretation of s. 1, sub-s. 2, and particularly upon the meaning to be given to the expression "carrying away." That expression cannot be construed in the technical, legal sense in this statute; it is to be construed in its ordinary every day sense. Private rights of property are not germane except in considering the question whether it is in the national interest to override them. It is further said that s. 3, sub-s. 1, when properly construed, does not empower the Court to have regard to economic conditions, but is limited to cases where "the proper and efficient working of the minerals" is unduly hampered by difficulties from the engineering point of view. Here, again, we submit that a wide meaning must be given to the words in question. Economic considerations may properly

be taken into consideration in interpreting the Act, the whole scope of which, indeed, is in favour of the view we present.

J. George Joseph for the Dover Harbour Board.

Cur. adv. vult.

Dec. 16. The following judgments were read :—

SCRUTTON L.J. This appeal by the Southern Railway Company against a decision of the Railway and Canal Commission raises an important question as to the jurisdiction of that tribunal. The Tilmanstone Collieries, Ld., are lessees of coal at Tilmanstone in the county of Kent. If they desired to send their coal to the nearest port, Dover, it passed over a railway route of eleven miles, partly belonging to the Southern Railway Company. They desired to send the coal to Dover by a ropeway, the length of which would be seven miles, and the cost, one shilling a ton less than by the Southern Railway route, without allowing for the extra convenience to them of having control of their whole route. The Dover Harbour Board, and most of the proprietors on the proposed route of the ropeway, assented. Some land owners, whose land would be affected by the ropeway, dissented, amongst them the Southern Railway Company, whose interest in land was confined to the fact that the ropeway crossed at one point a branch of their railway. The Colliery Company therefore applied to the Commissioners, under the Act of 1923, for the grant of an " ancillary right " of conveyance by ropeway of coal from the colliery shaft to Dover Harbour. The Southern Railway Company while not alleging that the proposed protection for their railway line where the ropeway crossed it would be insufficient, objected to the application on the ground that the Commission had no jurisdiction under the Act of 1923 to make an order and grant an ancillary right which was directed rather to marketing than " working " the Tilmanstone coal, and was sought to be justified on economical or commercial rather than legal or physical difficulties hampering the colliery. The Commission

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overruled the objection and granted the "ancillary right" asked for "to erect, lay down, maintain and use an aerial ropeway" according to certain plans which involved crossing the line of the Southern Railway Company. The Railway Company appeal on the ground that the Commission had no jurisdiction under the Act of 1923 to make such an order.

The power to grant "ancillary rights" is conferred by s. 3 of the Act of 1923. The combined effect of that section and s. 1, sub-s. 2, of the Act is to define "ancillary right" as "a facility, right, or privilege which is required in order that minerals may be properly worked, carried away, treated, and converted, where the proper and efficient working, carrying away, treating or converting of the minerals is hampered by the failure of the person working the minerals to obtain such right, facility or privilege." Instances of ancillary rights are given "without prejudice to the generality of the foregoing provision," and are as follows: "(*a*) A right to let down the surface"; this clearly includes surface not the property of the person working the mine; "(*b*) A right of air-way, shaft-way, or surface or underground wayleave, or other right for the purpose of access to or conveyance of minerals or the ventilation or drainage of the mines"; air-ways or surface wayleave for the purpose of "conveyance," a very wide word, may again be granted over other people's property; "(*c*) A right to use and occupy the surface for the erection of washeries, coke ovens, railways, by-product works, or brick-making or other works, or of dwellings for persons employed in connection with the working of the minerals or with any such works as aforesaid." This again applies to other people's property, and includes "railways" over them. Sub-ss. (*d*) and (*e*) give power to grant rights to take water from or drain water on to other people's property.

The Commission, by s. 6 of the Act, is to consider whether the requirements of the Act have been complied with, and whether "it is expedient in the national interest that the right applied for should be granted."

It would seem that Parliament intended that minerals

should be available for use where the national interest required it, and that if such minerals were unavailable owing to the unreasonable objection of some person who had the right to object to their proper convenient and efficient "carriage away," the Commission might overrule that unreasonable objection by granting an ancillary right of wayleave or conveyance, or making and using railways.

The objection of the Railway Company was based on a very technical use of the term "carry away." "Work," they said, in mining leases means detaching or severing coal from the coal face, "carrying away" is converting that coal into the lessees' possession. As soon as the coal is "carried away" in that technical sense, the power of the Commission ceases. They were not quite clear where the "carrying away" ceased. Before the Commission, their counsel appears to have argued that it could not extend beyond the land of the lessor. Before us a different line was taken; it was said the limit was not geographical, but one of the purpose of the Act. If the carrying was to the first place where the lessee had effective control, it was "carrying away"; further transport for sale and marketing was not "working." But the illustrations given were puzzling. I asked whether if a new shaft was projected five miles from a shipping port in one direction, and five miles from the nearest railway in the other, and intervening land owners refused all wayleaves so that the coal could not get away except by uneconomical road carriage, the Commission would have jurisdiction to grant an ancillary right of wayleave for a railroad to the nearest port and nearest rail. The answer was: "Yes." A similar answer was given to the question whether if the lessee wanted to get his minerals to works five miles off for the purpose of treating or converting them, for example, to coke ovens, an ancillary right of wayleave to the works could be granted. Again the answer was: "Yes." But I think it was said that the answer assumed there was no place on the way where the minerals could be reduced into possession or completely controlled by the lessee.

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In my opinion, the construction which the Railway Company seek to put on the statute is too narrow. Parliament, in my view, intended that where it was in the national interest that coal should be available for national purposes, and where the operation of rendering the coal available was hampered by the refusal of persons, whose consent before the Act was necessary, to grant proper facilities for the process of making the coal available, the Commission might over-ride that refusal on terms which it considered proper. It was said that this construction might lead to the sanction of hundreds of miles of railway without any of the precautions ordinarily taken by Parliament to protect private interests. In my view Parliament has placed confidence in the judicial tribunal concerned, both to protect individual interests and to over-ride them if it is in the interests of the nation so to do. The judgment of the Court below proceeds on these lines, and I agree with it.

The appeal in both cases must be dismissed with costs.

SARGANT L.J.: I agree that these appeals should be dismissed.

The first argument of the appellants was that the phrase "carrying away" in s. 1, sub-s. 2, of the Mines (Working Facilities and Support) Act, 1923, was limited to removing or transporting coal within the limits of the lessors' land; that the phrase, "conveyance of minerals," in s. 3, sub-s. 2 (*b*), must have an equally restricted meaning; and, accordingly, that there was no power in the Railway and Canal Commission to authorize any easement, by ropeway or otherwise, to convey minerals won by the respondents beyond their boundaries and across the railways of the Southern Railway Company and the East Kent Light Railway Company. In my judgment that argument fails at each step. The phrase "carry away" may no doubt include the removal of coal won; but no authority was cited to us to show that it was ordinarily or necessarily limited to such removal within the confines of the particular "take" or property where

the winning was effected. Even if the phrase "carry away" were prima facie so limited in s. 1, sub-s. 2, that is an inadequate reason for placing a corresponding limit on the word "conveyance" in s. 3, sub-s. 2 (*b*). And in addition the whole character of this argument is of a highly technical and narrow character, which is, in my judgment, quite foreign to the spirit and purpose of remedial legislation such as the Act now in question. Such legislation should in general be read broadly, and should not have its obvious purpose cramped and stultified by fine drawn distinctions, and verbal niceties, of this kind.

The second argument for the appellants was that s. 3 of the Act of 1923 was dealing only with physical difficulties in working minerals and not with economic difficulties at all; and that in the present case the difficulties to be overcome were purely economic. This argument is more attractive than the first, but I cannot accede to it. I agree with Sankey J. in thinking that the phrase "properly and conveniently worked" in its ordinary meaning does not exclude elements of cost, especially when applied to such a business as mining, where the whole possibility of profit, and therefore of initiation or continuance, is dependent on a margin —often a narrow one—of receipts over expenditure. And I do not think that there is any such contrast in s. 2 between the words "efficiently" or "economically" as compels one to exclude questions of economy in considering whether "the proper and efficient working of the minerals is unduly hampered" within s. 3, sub s. 1, of the Act. Certainly, as was pointed out by Sir Leslie Scott at the beginning of the brief argument which we heard from him, economic or commercial considerations are involved in s. 6, sub-ss. 4 and 5, ss. 7 and 8, sub-s. 7 of the Act. It is probably true that in mining, as in other engineering operations, almost any physical difficulty can be overcome, if expense can be totally disregarded. In practical operations it is impossible to leave expense out of the question, and excessive cost, actual or anticipated, may by itself result in "minerals being left permanently unworked," and render it "expedient in the

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national interest" that the Commission should interpose and grant rights to obviate the danger.

A good deal was said for the appellants as to the dangers of holding the Commission entitled to grant rights which might involve the construction of great lines of railway, and as to the absence of those safeguards which Parliament has imposed on undertakers under the Lands Clauses and Railways Clauses Acts But in this legislation the powers of the Act are confided to an important judicial tribunal; there is nothing anomalous in the parliamentary grant of an extensive discretion to such a tribunal; and the exercise of the powers of such a tribunal do not need to be safeguarded as in the case of the exercise of powers by private commercial undertakers. It seems to me that the Commission here have taken a sound view of their position and powers under an Act passed to enable them to over-ride private rights, where expedient in the national interest. And, indeed, I should have been satisfied merely to affirm the decision of the Commission without more, but for my desire to show that I had attended to and considered the arguments of Sir John Simon and Mr. Tyldesley Jones.

GREER L.J. I agree. Colliers go down into a mine not for the purpose of exercising their muscles in a healthy occupation, but for the purpose of earning enough money to keep themselves and their families in decent comfort. Mine owners and lessees of mines expend their capital by using it for sinking pits and paying wages and installing plant, not for reasons of benevolence nor for the mere purpose of contributing to the national welfare, but in order that they may earn profits for themselves which will justify them commercially for their expenditure of capital. If they cannot get a return for that expenditure the necessary result will be that their mines will be closed, the workmen will be deprived of their opportunity of earning their wages, the mine owner or lessee will have lost his capital, and the nation will have lost the opportunity of taxing the mine owners' income and will have to make provision for the men whose employment

has been determined. It is accordingly in the interest of every one concerned, and especially in the national interest, that facilities should be granted that will, if possible, enable the mine to continue to be worked, that is to say facilities calculated to decrease the risks of a loss in carrying on the mining enterprise, and increase the chances of profit. This desirable end cannot be achieved by granting facilities to enable the mine owner to bring his coal to the surface or to his own depot if he is hampered in carrying it to market by difficulties which can only be overcome by an expenditure that would involve carrying on his business at a loss. It is of no use to the mine owner to get his coal to the surface if other people's land intervenes between his mine and his market, which he either cannot cross at all, or can only obtain liberty to cross at a prohibitive price. One would accordingly expect that if Parliament provided for the granting to mine owners facilities for working, carrying away, treating and converting minerals, the facilities to be granted would be such as to enable the mine owner to increase his chances of carrying on his business profitably, or to diminish the risk of carrying it on at a loss.

In my judgment Parliament has by the Mines (Working Facilities and Support) Act, 1923, s. 3, given power to the Railway and Canal Commission to grant facilities, rights, or privileges to overcome hindrances to the carrying out of a mining enterprise. The words "carrying away" in s. 1 of the Act are not confined, as was argued on behalf of the railway company, to carrying away from the place where the coal is got to some place where it is effectively in the mine owner's possession as distinguished from that of the land owner. I do not think the words are used in the technical sense in which they are generally used in mining leases. Considering the object of the Act, I think the words at least cover the carrying away or transporting of the coal from the place where it is got to any convenient place where it can be treated, converted, or dealt with commercially by sale or delivery to purchasers. I think, for example, that if the nearest railway was seven miles away, the Railway and Canal

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Commission could grant a right to lay down a tramway or a ropeway from the mine to such railway, and I can see no difference in principle between this and granting, as they have done in this case, the right to erect and maintain an aerial ropeway to Dover Harbour. In my judgment the words "carrying away" are wide enough to include the facilities that have been granted by the Railway and Canal Commission in this case. But it was argued that even though that be so, still the Commissioners were wrong in law in granting such facilities because s. 3 does not contemplate facilities that are required for economic or commercial reasons. It was argued for the railway company that the privilege was not required for properly and conveniently carrying away the minerals, nor would the proper and efficient carrying away of the minerals be unduly hampered by the colliery company's inability to obtain the right to erect and maintain the ropeway in question. It was said that this section did not contemplate facilities required to overcome economic or commercial difficulties, but only difficulties which physically obstructed the carrying away of the coal. In my judgment this argument puts too narrow a construction on the section. I think in considering whether a mine can be properly and conveniently worked and the product properly and conveniently carried away, the tribunal is entitled to take into account the cost which it is necessary to incur in the absence of facilities which the mine owner asks for, and I am further of opinion that the proper and efficient working and carrying away of the minerals may be unduly hampered if the cost of getting them to a convenient place for disposal is, in the absence of such facilities, excessive.

It is quite true that this interpretation of the Act means that very large powers are given to the Railway and Canal Commission to override the rights of property owners, and it may well be that they would have power to authorize a railway 20, 30, or 40 miles long from pit to port, but it is to be observed that the powers are granted to Commissioners presided over by a judge of the High Court, that the applications for facilities are heard in public, and that the

Commissioners have power to impose reasonable conditions (s. 6), and to award fair compensation (s. 9). I agree the appeals should be dismissed.

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Appeal dismissed.

Solicitor for Southern Railway Company: *W. Bishop.*

Solicitors for East Kent Light Railway Company: *F. C. Mathews & Co.*

Solicitors for Tilmanstone Colliery Company: *Freshfields, Leese & Munns.*

Solicitors for Dover Harbour Board: *Mowll & Mowll.*

J. S. H.

[IN THE COURT OF APPEAL.]

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Revenue—Income Tax—Agricultural Society—Charity—Income of invested Funds—Exemption—"Body of persons established for charitable purposes only"—Income Tax Act, 1918 (8 *& 9 Geo.* 5, *c.* 40), *s.* 37, *sub-s.* 1 (*b*).

The Yorkshire Agricultural Society was formed in 1837 with the object of holding an annual meeting for the exhibition of farming stock, implements, etc., and for the general promotion of agriculture. All prizes were to be open to competition to the United Kingdom. Certain privileges were attached to membership of the Society, such as free admission to the shows and to parts of the grand stands at the shows; the opportunity of using a reading and writing room on the show grounds; a right to have manures and foodstuffs analysed at reduced fees; special railway facilities, and similar benefits. The income of the Society was derived from entry fees and gate receipts, local subscriptions for prizes, interest on investments, and subscriptions of members. Any excess of income over expenditure, which excess amounted to 2,131*l.* in 1923, was invested, and in the event of a show resulting in a loss, the loss was met by a sale of investments. An assessment to income tax on the income of its invested funds for the year ending April 5, 1923, having been made, the Society claimed exemption on the ground of being a charity. The Special Commissioners found that the Society was established for charitable purposes only, and allowed its claim for exemption. Rowlatt J. reversed that decision on appeal, being of opinion that the objects of the Society were partly objects for the benefit of the members only.

On appeal:—

Held, on the facts found by the Commissioners that the Society was established for a charitable purpose; that that purpose continued

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notwithstanding the incidental benefits enjoyed by members; and that those benefits did not prevent the Society from being established for a "charitable purpose only" within s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918.

Held, therefore, that the Society was entitled to the exemption it claimed.

Decision of Rowlatt J. reversed.

APPEAL from a decision of Rowlatt J. on a case stated under the Finance Act, 1925, s. 19, sub-s. 3, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting held on June 2, 1926, the Commissioners heard the claim of the Yorkshire Agricultural Society for exemption from income tax under s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, in respect of the income from the investments of the Society for the year ended April 5, 1923, on the ground that the Society was established for charitable purposes only.

The following facts were admitted or proved:—

The Society was formed at a meeting held at York on October 10, 1837, when the following resolutions (inter alia) were passed: "That a society be formed called 'The Yorkshire Agricultural Society,' the object of which shall be to hold an annual meeting for the exhibition of farming stock, implements, etc., and for the general promotion of agriculture." "That every subscriber of 1*l.* annually be a member of the Society." "That all the prizes shall be open to competition to the United Kingdom." The Society was not incorporated and had no deed of trust.

The objects of the Society at the present time were: (1.) The holding of an annual show for the exhibition of live stock, poultry, farm produce, horticultural produce, also of machinery, implements, tools, appliances, utensils, etc., connected with or appertaining to agriculture; such annual show to be held successively in different parts of the county; (2.) the improvement of live stock, poultry, implements, machinery and appliances in connection with agriculture; (3.) the demonstration of methods and processes connected with,

and the furthering of the interests of agriculture, horticulture, arboriculture, apiculture and allied industries; (4.) agricultural education; (5.) scientific research and experimental work; (6.) watching and advising on legislation affecting the agricultural industry. This last object was one which was added at a meeting of members held in 1923. Previous to that alteration in the objects it had been forbidden to introduce any subject connected with legislative enactment at any meeting of the Society.

The following provisions were made in the rules of the Society:—

"6. Members of the Society shall be elected by the council from persons, firms, companies, or associations, who shall have signified their desire to become members by signing the Society's form of application for membership and shall have paid the required subscription. In the case of firms only one member of the firm, in the case of companies only one director, and in the case of associations only one member shall be entitled to nominate or vote for members of the council and the riding in which the principal office or place of business of the firm, company, or association is situate shall be the riding to which such right of nomination and voting shall be applicable, unless such firm, company or association shall pay a separate subscription in respect of each riding in which it holds a qualification, in which case such firm, company, or association shall be entitled to nominate and vote for candidates in each riding in respect of which they pay a subscription."

"9. The following subscriptions shall constitute membership of the Society after election by the council: A vice-president not less than 50*l.* as a life member, or not less than 5*l.* as an annual member. An ordinary member not less than 15*l.* as a life member, or not less than 1*l.* as an annual member. A lady member 10*s.* as an annual member, which subscription entitles the subscriber to all the privileges of membership, with the exception of making entries at the annual show at members' rates. After payment of not less than twenty annual subscriptions a member may become a

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life member of the Society by the payment of 8*l*. Annual subscriptions shall become due and shall be payable in advance on the 1st day of January in each year, and so long as the annual subscription is continued to be received by the Society the subscriber shall enjoy all the privileges of membership. In all cases where a member wishes to withdraw from membership of the Society, notice in writing to that effect must be given to the secretary on or before the 31st day of December in any year, otherwise the annual subscription becoming payable as set out above on the 1st day of January following will be claimed as due to the Society."

"10. A member of the Society whose subscription is not in arrear shall have free admission to all exhibitions of the Society, and reduced entry fees for his exhibits, and shall be entitled to other privileges as may from time to time be arranged by the council of the Society."

"The present privileges of members of the Society were: (1.) to free admission to the great Yorkshire shows of the Society; (2.) to free admission to the unreserved parts of the grand stand at such shows; (3.) to purchase tickets for the reserved seats at a considerably reduced rate; (4.) to use the members' dining, reading and writing rooms on the show ground; (5.) to reduced rates of exhibits in the Society's shows; (6.) to nominate and vote for the election of members of the council; (7.) to receive a free copy of the 'Journal' annually; (8.) to have manures and feeding stuffs analysed at reduced fees; (9.) to attend and vote at general meetings of the Society; (10.) to receive a copy of the 'Journal of the Ministry of Agriculture and Fisheries' every month, at the reduced rate of 4*s*. 6*d*. per annum, post free; (11.) to benefit by any special railway facilities for the show which might be in force; (12.) to free admission to the stand at the working dairy; (13.) to free admission to the hound show; (14.) to free admission to the horticultural exhibition on the show ground, and to any other department where an extra charge was in force; (15.) to apply for district prizes that might be offered."

"14. In order to be entitled to make entries at the annual show at members' rates, an exhibitor must have paid at least two annual subscriptions as a member of the Society, including the subscription for the current year, or, if he be a new member, the exhibitor must have paid a subscription for the current year and also a subscription for one year in advance. No member whose subscription is unpaid shall be qualified to make an entry for the annual shows of the Society nor be allowed to exhibit as a non-subscriber."

There was no provision in the rules for the disposal of the funds of the Society in the improbable event of the Society being wound up.

In pursuance of the objects of the Society a show had been held annually since its foundation for the exhibition of live stock, dairy produce, garden produce, implements, etc. Lectures and demonstrations on dairying subjects, bee-keeping and other matters of interest to the agricultural community were given at the show, and competitions were held in butter-making, poultry-trussing and horse-shoeing. All competitions, with the exception of one small class of shorthorn bulls, were open to any farmer in the United Kingdom. Members of the Society were charged smaller entrance fees for their exhibits than non-members.

The show was held at a different place in the county each year. Local subscriptions were collected at the place where the show was held for the purpose of providing prizes.

In addition to the show, the Society conducted demonstrations in trials of implements, held annual competitions for clean milk production in Yorkshire, held demonstrations and shows of potatoes, did chemical research work for members, and made grants to local shows in Yorkshire, to the National Pig Breeders' Association and to rural industries.

The Society also published a journal for the dissemination of scientific knowledge of value to farmers and stock-raisers.

Of the members of the Society, who now numbered about 3000, a certain proportion (about 10 per cent. of the new members admitted in 1924) consisted of companies or firms not engaged in agriculture. Such members joined the Society

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in order to acquire space for exhibiting their products at the show at the cheaper rates granted to members. About one-half of such members ceased their membership after having exhibited at one show.

The income of the Society was derived from entry fees and gate receipts, local subscriptions for prizes and other miscellaneous receipts at the show (15,911*l.* in 1923), interest on investments (341*l.*), and subscriptions of members (1792*l.*). The expenditure of the Society was mainly on the show (13,983*l.*), the Journal (124*l.*), grants to district societies (98*l.*), and general administration expenses (1714*l.*). Any excess of income over expenditure (2131*l.* in 1923) was invested. In the event of the show resulting in a loss, the loss was met by a sale of investments.

It was contended on behalf of the Society: (1.) That the Society was established for the advancement of education in agricultural matters, and for purposes beneficial to the community; (2.) that the fact that there was no provision in the rules of the Society for the disposal of its funds on a winding up was immaterial, the Society having been established for charitable purposes only; (3.) that the Society was established for charitable purposes only, and the claim for exemption from income tax should be allowed.

It was contended on behalf of the Crown (inter alia): (1.) That the advancement of agriculture was not in itself a charitable object; (2.) that the Society was established for the benefit of its members and not for the benefit of agriculture generally; (3.) that in any event watching and advising on legislation affecting the agricultural industry was not a charitable object; (4.) that there was no provision in its rules for the disposal of its funds on the winding up of the Society, and, as the Society apparently had power to realize its investments for the purpose of meeting any loss on its shows, its funds were not protected by a trust of a permanent character; (5.) that the Society was not established for charitable purposes only, and the claim for exemption from income tax should be refused.

The Commissioners held, though with some doubt in view of the wide nature of its stated objects, that the Society was a society established for charitable purposes only, and that its claim for exemption from income tax on the income of its investments should be allowed.

Rowlatt J. reversed the decision of the Commissioners on the ground that the Society was not carried on wholly for the benefit of agriculture, but partly for the pleasure and benefit of the members.

The Society appealed. The appeal was heard on November 8, 9, 10, 1927.

Gavin Simonds K.C. and *Raymond Needham* for the Society. The question is whether the real object for which the Society was established was the promotion of agriculture generally or whether it was the benefit of the members composing it. In the former case the Society would be exempt from income tax, and in the latter it would not. The question is really one of fact to be determined by the Commissioners. They have found that having regard to the wide nature of its stated objects that the Society was a society established for charitable purposes only within the meaning of s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, and as such was entitled to exemption from income tax on its investments. That finding, it is submitted, ought not to be interfered with by the Court.

In order to constitute a society a charity, its object or purpose must be one that is beneficial to the community. In the present case the object of the Society as appearing by the resolution by which it was established was to promote agriculture generally, and in particular to do so by holding an annual show as a means of advancing the knowledge of agriculture and raising its standard.

The meaning of charity was discussed in *In re Foveaux* (1), and it was there held that societies for the suppression and abolition of vivisection were charities within the legal definition of the term "charity." In that case Chitty J. said that the method employed by the Court was to consider the

(1) [1895] 2 Ch. 501, 504.

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enumeration of charities in the Statute of Elizabeth, bearing in mind that the enumeration was not exhaustive. Institutions whose objects were analogous to those mentioned in the statute were admitted to be charities; and, again, institutions which were analogous to those already admitted by reported decisions were held to be charities. In *In re Pleasants* (1), where the gift was to provide prizes for the best kept gardens and cottages, Russell J. held that the gift had the ulterior object of promoting horticulture and was for the benefit of the community, and therefore charitable. In *Royal Agricultural Society of England* v. *Wilson* (2) it was held that the society was a charity, but that inasmuch as it was carrying on a show by which it made a profit it was liable to tax. The effect of that decision was altered by s. 23 of the Finance Act, 1924. That section shows that the Legislature recognized that a society for the promotion of agriculture was a charity. It is submitted that the public is interested in the maintenance of agriculture for the benefit and safety of the country.

[They also referred to *In re Gray* (3) and *In re Verrall.* (4)]

Sir Thomas Inskip S.-G., *J. H. Stamp* and *R. P. Hills* for the Crown. It is submitted that the Society is not a trust at large for the benefit of agriculture but is for the promotion of the trades carried on by the members composing it. As was pointed out by Lord Haldane in *Attorney-General* v. *National Provincial Bank* (5), Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (6) cannot be taken to have intended to say that anything which belonged to the more general or public character of the fourth class enumerated by him could be the subject of a good gift if it did not in some sense come within the general category of charity. Here the funds of the Society are not trust funds. The Society was not established for charitable purposes only. The dominant object of the Society is to promote the benefit of its members. It is true no doubt that they are engaged in a particular industry. Our

(1) (1923) 39 Times L. R. 675.
(2) (1924) 9 Tax Cas. 62.
(3) [1925] Ch. 362.
(4) [1916] 1 Ch. 100.
(5) [1924] A. C. 262, 267.
(6) [1891] A. C. 531, 583.

contention is that the promotion of agriculture is not in itself a charitable object. It is impossible in considering the question of exemption from tax to distinguish agriculture from any other trade.

The Society is really a members' society, and although it may benefit the public at large it is not a charity. The authorities show that however good, philanthropical or beneficial to the community, the objects of a society may be, yet if they do not possess the element of charity within the spirit and intention of the Statute of Elizabeth, the society is not a charity: *Carne* v. *Long* (1); *In re Clark's Trust* (2); *In re Dutton's Trusts* (3); *Cunnack* v. *Edwards* (4); *Miley* v. *Attorney-General* (5); *In re Macduff.* (6)

Further, the element of permanency is wanting. It is of the essence of a charitable trust that the income should be permanently applicable to charitable purposes: *Morice* v. *Bishop of Durham* (7); *Ex parte Headmasters' Conference* (8); *Birkenhead School, Ld.* v. *Dring* (9); *Ex parte Rank's Trustees.* (10) Here the Society is under no obligation to continue to apply its funds for charitable purposes. It may at any time alter its rules and apply its funds for purposes which are not charitable.

Again, the Society is not established for charitable purposes only. Amongst its objects is that of watching and advising on legislation affecting the agricultural industry. That is not a charitable object: *Inland Revenue Commissioners* v. *Temperance Council of Christian Churches of England and Wales* (11); *Bowman* v. *Secular Society.* (12)

Gavin Simonds K.C. replied.

LORD HANWORTH M.R. This is an appeal from a decision of Rowlatt J., who refused to allow the claim of the Yorkshire Agricultural Society to exemption from income tax under

(1) (1860) 2 D. F. & J. 75.
(2) (1875) 1 Ch. D. 497.
(3) (1878) 4 Ex D. 54.
(4) [1896] 2 Ch. 679.
(5) [1918] 1 I. R. 455.
(6) [1896] 2 Ch. 451.
(7) (1805) 10 Ves. 522.
(8) (1925) 10 Tax Cas. 73.
(9) (1926) 43 Times L. R. 48.
(10) (1922) 8 Tax Cas. 286.
(11) (1926) 42 Times L. R. 618.
(12) [1917] A. C. 406.

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s. 37, sub-s. 1 (*b*), of the Act of 1918. By his judgment he reversed the decision of the Special Commissioners, who had allowed the application of the Society.

It is important, in my view, to state the facts upon which this claim is based, and I will summarize a certain number of those facts as stated to us in the case.

The Society was formed at a meeting at York held on October 10, 1837. We have attached to the case the notes or some of the minutes of that meeting. The first resolution that was passed was: "That a Society be formed called 'The Yorkshire Agricultural Society,' the object of which shall be to hold an annual meeting for the exhibition of farming stock, implements, etc., and for the general promotion of agriculture." Under resolution No. 4, donations were asked for, for the purpose of forming a fund to carry into effect the views of the Society. Under No. 11, a committee was formed for the purpose of defining the duties of the Society and settling all other matters required for the regulation of the Society. By No. 12 it was declared "That no subject connected with any legislative enactment be ever introduced at any meeting of this Society"; and in No. 13, "That all prizes shall be open to competition to the United Kingdom." Those resolutions are, I think, all that I need refer to.

Incidentally there are and always have been certain privileges attached to membership of the Society, and those are set out in the case. Shortly stated, they are: free admission to the shows and to parts of the grand stands at the shows, the opportunity of going to a reading and writing room on the show ground, a right to have manures and foodstuffs analysed at reduced fees, special railway facilities, and similar benefits. I think that Rowlatt J. is right in his judgment when he sweeps aside those benefits as really not assisting in the determination of the case one way or the other. In a recognized charity, such as a hospital, many subscribers receive tickets for in-patients or out-patients and have privileges reserved to them which in no way militate against the main purpose of the hospital, which is charitable.

The Society has now been going on for some three generations. Quite recently, in 1923, it annulled the rule under the resolution to which I have referred, resolution No. 12, that no subject connected with any legislative enactment be ever introduced at any meeting of the Society, and adopted as one of its objects: "the watching and advising on legislation affecting the agricultural industry and the improvement, assistance and promotion of agriculture generally." Rowlatt J. sets that aside, and I think rightly, as not being a serious factor in the consideration of whether or not the main object of the Society is charitable. As the objects of the Society now stand, I think it would be fair to describe them as being for the assistance and promotion of agriculture generally, and in particular certain objects are specified by which that general object, the improvement and promotion of agriculture, may be attained.

It is said also that certain privileges are granted not merely to what I might call constituent members, but to some members who become members for a single year. That feature also, I think, may be set aside. They obtain such privileges as they do, as members, and the fact that they are members for one year only, does not in any way alter the general nature and purpose of the Society as a whole.

Now, that being the Society, it makes the claim to exemption from income tax in respect of any interest, annuities, or dividends forming part of its income, inasmuch as it claims to be a body of persons established for charitable purposes only, and so far as that income is applied to charitable purposes only.

In the long course of its history of some ninety years, the Society has gathered together certain funds. That gives stability to it and it is in respect of the income from those funds, which is said by the inspector to be liable to income tax, that the Society claims exemption under s. 37 of the Act of 1918. If the Society is to have exemption, it has to be decided in its favour that it is a body of persons established for charitable purposes only.

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The definition of what is a charity is not the definition that it would probably receive in ordinary parlance. In the case that one always refers to on such a subject, *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1) Lord Macnaghten sets out his catalogue of what are the different kinds of charities intended to be recognized as charities for the purposes of this and the corresponding section of the preceding Act: "Charity, in its legal sense," he says, "comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." Now, that fourth division, of course, is of a somewhat wide and indefinite nature. What is a "purpose beneficial to the community"? It has long been established that a mere benevolent purpose is not necessarily a purpose beneficial to the community. We have examined once more, and rightly examined, a large number of cases; and it may be said that it has now been determined in such cases as *In re Gray* (2) that where the main object was the physical efficiency of the army, that was a purpose beneficial to the community. Equally the activities of the Anti-Vivisection Society, whether in the form of an attempt to secure legislation or otherwise, have been held also to be within that wide term in *In re Foveaux*. (3) Also in *In re Verrall* (4) it was held to be a charitable purpose to try to secure the maintenance of places of historic interest or natural beauty.

On the other side it has been determined that where the purpose of the association is rather for the benefit of the members themselves, than a wider aim, then such institutions as are so established are not within the purview of purposes beneficial to the community. Illustrations of that can be found in *In re Dutton's Trusts* (5); in *Carne* v. *Long* (6) (the case of the Penzance Library); and again in

(1) [1891] A. C. 531, 583.
(2) [1925] Ch. 362.
(3) [1895] 2 Ch. 501.
(4) [1916] 1 Ch. 100.
(5) 4 Ex. D. 54.
(6) 2 D. F. & J. 75.

Ex parte Headmasters' Conference (1); the friendly society in *In re Clark's Trust* (2); and again in *Cunnack* v. *Edwards.* (3)

Having given those illustrations on the one side and the other, one comes back to consider whether or not the benefit of agriculture generally, without a limit of range, is an ultimate object beneficial to the community, and thus within the fourth division of Lord Macnaghten's table.

Rowlatt J., in the present case, says: "If this Society was formed for the general improvement of agriculture, then I should say that that would be a charity," following *In re Pleasants.* (4) He said that this did no more than confirm the view that he had already expressed in *Royal Agricultural Society of England* v. *Wilson* (5), for although it had not to be determined whether or not the Royal Agricultural Society was a charity, inasmuch as for the purposes of the case it was admitted that it was, yet he there said: "Now it is perfectly clear that a body like this, which is a charity, may trade."

It seems to me that the right interpretation to be given to the object of this old Society is that the Society has been formed for the purpose of the improvement of agriculture as a whole, and not for any confined purpose of benefiting only the particular members of the Society or those resident in the locality to which its name attached it, and for a purpose which may bring advancement and improvement to the benefit of the community at large. I think that that general purpose remains in spite of the matters to which I have already referred—namely, the benefits which are catalogued in the case, and the alteration of one of the objects of the Society in the matter of legislation.

Having come, therefore, to the conclusion that this Society is prima facie established for what may be considered to be a charitable purpose, one then has to discover whether or not it can satisfy other portions of the test of s. 37. Has it been "established for charitable purposes only"? With

(1) 10 Tax Cas. 73.
(2) 1 Ch. D. 497.
(3) [1896] 2 Ch. 679.
(4) 39 Times L. R. 675.
(5) 9 Tax Cas. 62, 67.

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regard to the last word, "only," inasmuch as, for the reasons I have given, I have set aside the matter of the benefits I have mentioned, there does not to my mind seem to be anything against the main purpose in this criticism. The purpose appears to be the advancement of agriculture, undiminished by what has been alleged against the purpose as indicating material benefits to the members of the Society only. It must, therefore, have been "established." Rowlatt J. again holds that it is established. I have said that I do not think there is such a want of the element of permanency as to prevent the Society being established. The fine record which for over three generations this Society has enjoyed seems to justify one in describing it as an established society. On the other hand, it is necessary to remember that there may be a society which has other purposes besides those which fall within the definition of "charitable," and in that case the Society would fail to get exemption, because it was not established for charitable purposes only.

Illustrations of cases where there has been a failure on the part of societies to obtain that exemption are to be found in the cases to which our attention has been called: *Morice* v. *Bishop of Durham* (1); the Irish case of *Miley* v. *Attorney-General* (2), where there were two objects, one of which was not charitable; *In re Macduff* (3); and *Attorney-General* v. *National Provincial Bank; Tetley's* case. (4) In those cases where you have a gift "to a patriotic purpose or" something else, or where there is a power of appointment reserved so that the trust will be fulfilled even if there was not a devotion to the particular charitable purpose, it cannot be said that the words, "established for charitable purpose only," have been fulfilled. A good illustration of that is *Ex parte Rank's Trustees.* (5) The Solicitor-General and Mr. Hills have therefore argued that upon the facts of this case, if attention is given to the objects of the Society which are cited, the six of them, it is not right to hold that there

(1) 10 Ves. 521.
(2) [1918] 1 I. R. 455.
(3) [1896] 2 Ch. 451.
(4) [1924] A. C. 262.
(5) 8 Tax Cas. 286.

is an establishment for charity, but that even if there has been an establishment for charity, and even admitting that agriculture may be a charitable purpose, this Society is not, within the meaning of the section, established at all.

Now, in my judgment, for the reasons I have given, the Society was originally established and has been continued during its long existence as a Society intended to benefit and promote the advancement of agriculture, and looking at the main purpose, it has been made out that agriculture can be, and in this case is, a charitable purpose. The criticism that is based upon the other objects of the Society as catalogued, or the advantages to members, and so on, does not prevent the finding that this Society is established for an object beneficial to the community, within the fourth division of Lord Macnaghten's catalogue.

Now, dealing with the second point argued on behalf of the Crown, that it is not established at all, it appears to me that s. 37 of the Act of 1918 itself contemplates persons who are not connected by the bond of a trust deed or by incorporation in any way; for it gives this exemption to the income of any body of persons or trust, and "body of persons" is defined in s. 237 of the Act to mean "any body politic, corporate or collegiate, and any company, fraternity, fellowship and society of persons, whether corporate or not corporate." It seems to me clear, therefore, that s. 37, sub-s. 1 (*b*), is intended to embrace within its terms a mobile or shifting body, one that has not a clearly defined basis recorded in a trust deed, but which may nevertheless be one of such permanence that it could be found as a fact to be a body of persons established.

The consideration of this point, not less than the previous point that I have discussed, leads me to say this. It is obvious that the facts in each case must be the basis on which one finds whether or not there is a body of persons established, and whether or not they are established for a charitable purpose; and that if it is a question of degree, then it is a question of fact, and if it is a question of fact, it is a matter within the sphere of the Commissioners. This Court and

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the Court below cannot upset a finding of fact. It appears to me that there was evidence upon which the Commissioners could find on this question of degree that the Society was a body of persons established, and established for a charitable purpose only. I should regret very much to interfere with what is undoubtedly the duty of the Commissioners, and they have held, in para. 6 of the Case, though with some doubt, that the Society was a society established for charitable purposes. Rowlatt J. has, I think, set aside that finding of fact, because although he has given his opinion, with which I have agreed, on the three matters already dealt with, yet he came to the conclusion that the object of this Society was not to promote agriculture, but rather to promote the tastes and pleasures of the members who were associated together. That view might have been taken by the Commissioners, but it was not. They have held, and to my mind rightly held, for I should have taken the same view of the facts myself, that the continuity of this Society, the original establishment of it, the resolutions as framed to start it, all connoted a Society intended to be established not for the ephemeral purpose of promoting the pleasure of its members, but for the longer and more permanent object of importance to the community, of the advancement and improvement of agriculture, even though one of the means of that advancement was by holding a show at which some of the members more particularly than others, would reap personal advantages.

Lastly, I desire to refer to the Finance Act, 1924. It had been determined, in *Royal Agricultural Society of England* v. *Wilson* (1), that the Society was assessable to income tax in respect of the profits of the annual show which they inaugurated, inasmuch as, in carrying on that show, they were engaged in a concern in the nature of trade. In a number of cases it has been held that a society which is a charity for the purposes of exemption, may yet carry on a trade and not be exempt in respect of the profits of that trade. It was indeed, I agree with the Solicitor-General, quite

(1) 9 Tax Cas. 62.

unnecessary for the purposes of that case to decide whether or not the society was a charity, but even if it was admitted to be a charity, yet it might still be liable under Case I. of Sch. D in respect of the profits of the business in which it engaged. I cannot fail to observe that Rowlatt J. expresses the opinion to which I have already referred, and that the effect of that case was altered by s. 23 of the Act of 1924. The terms of the section are as follows: "(1.) Any profits or gains arising to an agricultural society from an exhibition or show held for the purposes of the Society shall, if they are applied solely to the purposes of the society, be exempt from income tax. (2.) The expression 'agricultural society' in this section means any society or institution established for the purpose of promoting the interests of agriculture, horticulture, live-stock breeding or forestry," and so on. Those words, "if they are applied solely to the purposes of the society," are difficult to understand, indeed it is not easy to give a true meaning to them, unless they were intended to be based upon the fact that the society being for the promotion of the interests of agriculture was a charity. If so, then if the profits are applied solely to the purposes of the society, they are applied solely to the purposes of a charity, and the whole system works well together; it is a charitable society which reaps certain gains and devotes those gains to the cause of charity. Without saying that that is intended to be a legislative interpretation of the meaning of "charity," I cannot help feeling that some weight must be given to it, as indicating that there are cases where an agricultural society which is established for the purpose of promoting the interests of agriculture may well be held to be a charity within the meaning of the definition of that term.

It appears to me, upon the consideration of this case, that the question was one of degree, and therefore a question of fact, and that we cannot upset the finding of the Commissioners on that question of fact, inasmuch as there was abundant evidence upon which they could come to the conclusion to which they did. I do not think that this case will necessarily be a guide in all cases, because the

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decision of the question must depend upon the facts in each case. Where we have the finding of fact, as it is in this case, favourable to the Society, I am unable to set aside that finding or to hold that the Society is a collection of individuals based on the advancement of their own taste or pleasure. I think there was evidence on which the Commissioners could, and rightly did, come to the conclusion that this was a Society established for charitable purposes only, and thus, if and so far as it received any interest or dividends on shares or the like, those receipts are entitled to exemption, if and so far as the same are applied to charitable purposes only.

For these reasons the appeal must be allowed, and the decision of the Commissioners restored.

ATKIN L.J. This question arises in respect of the income of the Yorkshire Agricultural Society derived from investments belonging to the Society and forming part of its income. Therefore the question is whether under s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, these sums form part of the income of a body of persons established for charitable purposes only.

The question is of some importance, because the chief issue in the case is whether the Yorkshire Agricultural Society is established for charitable purposes, and that is and always has been a question that has admitted of some debate in the Courts. It is a matter of considerable importance, because for a considerable time the conception of what is charitable in the Income Tax Acts has been held to be governed by the conception of what is deemed to be charitable within the Mortmain Act and Charitable Uses Acts. It is important, therefore, to see that no body of persons improperly escapes taxation for national purposes and at the same time that nothing is laid down which improperly obstructs the flow of charitable bequests.

There are three expressions in the statute which have to be considered in this case. We have to deal with a body of persons: (1.) established; (2.) established for a charitable purpose; and (3.) established for a charitable purpose only,

and I propose to deal with each of those matters, which I think will cover the whole of the argument addressed to us on either side.

The first question is whether this is a body of persons established. In respect of that it has to be remembered that the definition of "body of persons" which is given by s. 237 of the Act of 1918 is that it "means any body politic, corporate, or collegiate, and any company, fraternity, fellowship and society of persons, whether corporate or not corporate"; and it therefore includes a voluntary association of persons. Now I do not propose to consider to what extent it is necessary to find some degree of permanence contemplated in the bond of association of persons to enable one to say that the association or the society is established. For my part I am not prepared to say that there is much difference between established and formed. It may be, of course, that a mere ephemeral association could be said to be established; indeed it would hardly be relevant to this particular section, which only deals with annual payments coming to such a society, and therefore it must be a society in existence for at least a year, or possibly for more than a year. In this case we have a society which was formed in 1837, obviously intended to be in existence for some time and in fact continuing up to the present time for ninety years. Therefore it appears to me that here we have a body of persons established.

The next question is whether the Society is established for a charitable purpose. The purpose is found, I think, by the Commissioners, who accept the view of the purpose which is expressed in the original resolution forming the Society and has been amplified in the rules and objects of the Society as now formulated. When I say "amplified" it appears to me that the main purpose, which is the general promotion of agriculture, still remains the main purpose of the Society; and so far as I can see—and I think it has been so found—it is the only purpose of the Society. But the definition of the objects as now formulated by the Society goes into more detail and is more specific than it was orginally,

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and it appears to me that the general purposes of the Society include education in agricultural matters, the improvement of stock and agricultural products generally, and certainly include, therefore, a form of technical education. Undoubtedly it is a purpose which promotes to an important degree the public interest, and while I quite agree that the mere statement that the Society is formed for the promotion of public interest will not in itself show it to be charitable only, nevertheless when you have to deal with a specific purpose and specific ways in which you are to promote the public interest it becomes very difficult to see that such a purpose falls short of that which makes it charitable. You are to act by analogy to the instances—I treat them merely as instances—given originally in the statute of Elizabeth and now incorporated in s. 13 of the Mortmain and Charitable Uses Act, 1888, the Statute of Elizabeth, which is constantly referred to, being now as dead as Queen Elizabeth herself, because it was repealed by that Act.

Dealing with cases in which objects have been held to be charitable, either on the form of the bequest or for the purpose of taxation, one finds that in *In re Verrall* (1) the express objects of the trust were for the preservation of buildings of historic interest or in the case of lands for the preservation of their natural beauty and animal and plant life. Charitable objects have been held to include the physical training of the officers and men of the carbineers, anti-vivisection purposes, the encouragement of horticulture, and so on. I myself have no doubt at all that if the question of validity had to be considered with regard to a bequest for the general improvement of agriculture, including, if you please, specific mention of the encouragement or holding of an agricultural show, such a bequest would be held to be a charitable bequest. I myself, therefore, have no doubt that in this case this Society was established, and was established for charitable purposes.

The next question is whether it was established for charitable purposes only. The attack upon that is made in

(1) [1916] 1 Ch. 100.

threefold manner. First of all it is said: No, this Society was in fact formed for the purpose of giving benefit to its members; it is nothing but a club for the mutual advantage of the members of the club. If that were so I agree that the claim of the Society would fail, both because it could not be said that the Society was established for a charitable purpose, and because it certainly could not be said that it was established for a charitable purpose only. There can be no doubt that a society formed for the purpose merely of benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated or having their æsthetic tastes improved or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think that it would not be established for a charitable purpose only. But, on the other hand, if the benefit given to its members is only given to them with a view of giving encouragement and carrying out the main purpose which is a charitable purpose, then I think the mere fact that the members are benefited in the course of promoting the charitable purpose would not prevent the Society being established for charitable purposes only. That I imagine to be this case. You may form a society for the purpose of getting contributions and in order to get contributions you may have to make some reduction to a member, something less than his contribution. That does not, to my mind, prevent the object of the society being still for a charitable purpose. As I said in the course of the argument, in order to get a contribution of 9d. you may have to give your member benefits to the value of 4*d.*, but you are still 5*d.* to the good for your charitable purpose, and if you are giving that benefit for the purpose of getting the 5*d.* and devoting it to charitable purposes, it seems to me your purposes are still what they were—exclusively charitable.

There is plenty of evidence in this case that the operations of the Society are general and extend to the promotion of agriculture generally and not merely to the benefit of the members. I attach no importance at all, therefore, to the

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mere fact that the members of the Society are induced to become members by receiving advantages at the show by being charged a smaller fee or that in respect of their membership they get perhaps a copy of the "Journal" or that they get facilities for having their products analysed, and so forth. It appears to me as a matter of fact which is accepted and found by the Commissioners that all those matters are not inconsistent with the Society being established for charitable purposes only. The other contention that was made, which I think is after all only an instance of what I have been dealing with, is the statement which is found that one of the objects of the Society is watching and advising on legislation affecting the agricultural industry. It is said that if that stood by itself it plainly would not be a charitable purpose; and I can imagine that a society which was formed solely for the purpose of watching and advising on legislation affecting agriculture would not be a society formed for a charitable purpose. But that does not seem to me at all to affect the matter. It is perfectly consistent with the main object of the Society being one for the promotion of agriculture generally, that in order to carry out its object it should watch and advise on legislation affecting agriculture. Supposing a society formed for the admittedly charitable purpose of promoting education, or of promoting the relief of the sick and poor, it appears to me impossible to suggest that it might not be well within the charitable objects of such a society to watch and advise on legislation, in the one case affecting education and in the other case affecting the relief of the sick and poor. Therefore, in my opinion there is no reason for picking out that particular object so defined as being something so inconsistent with the main charitable purpose as to amount to something different, so that there are two purposes and not one.

The other attack that was made upon the Society was this. It was said, this is a voluntary Society, there are no rules and by-laws limiting its activities, and therefore at any moment it may devote its funds to a non-charitable purpose. It might, it is said, distribute its funds amongst

its members or in relief of its members and that would not be a charitable purpose, and therefore it is to be deemed to be not a Society formed for a charitable purpose. I think, with respect, that that is a non sequitur. The question you have to consider is whether at the relevant time you are dealing with the income of a society established for charitable purposes only, and in respect of that income also you have to consider whether the income is applied in fact to charitable purposes only. It may be said of every voluntary society that, as it voluntarily came into existence, so it may voluntarily cease to be in existence; as it voluntarily associated so it may voluntarily dissolve. The mere fact that it may dissolve at any time and come to an end seems to me to have nothing to do with this particular problem. As it may dissolve itself, so I think it is fairly plain that it may, if it chooses, reassociate itself for other purposes, either by dissolving itself and forming itself into a society for another purpose, or it may be by adding to its objects, objects which are non-charitable, or by substituting for its objects an object which is non-charitable instead of a charitable object. But if it does so, then it appears to me that the Society will cease to be a society established for a charitable purpose, and its funds will presumably not be devoted to charitable purposes only. But until it does do so it appears to me that the question is the same, whether it was established for a charitable purpose and whether it is still operating in that sphere. As I have said, if in fact it did choose to adopt as its purpose some additional and non-charitable purpose, the position would be that its income derived after that time would not be subject to the obligation to expend it for a charitable purpose, but its income acquired while it professed to be a society for a charitable purpose only would have to be so applied.

It seems to me immaterial to consider what are the precise remedies given either to the Attorney-General as representing the public, or to the individual members, for the purpose of enforcing that obligation, but the obligation plainly exists, and to my mind is plainly enforceable. In this particular case the Society has not changed its constitution, it has not

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adopted non-charitable purposes, and its investments and income remain quite plainly, to my mind, bound by the obligation to apply them to charitable purposes and to charitable purposes only.

The result of that is that it seems to me that this Society falls within the definition in the Act and that the finding of the Commissioners was right. I think that the question is very largely one of fact, but so far as it is one of law I agree with them, and so far as it is one of fact, if it were for me, I should agree with their findings.

The only other matter to which I need refer is, not the threat, but the suggestion, by the Crown that we should be very careful in coming to this conclusion because serious consequences might follow to the Revenue, and that there might be an extension of the principle now adopted which would be very far-reaching. I must say that I am not alarmed. I do not think this decision goes further than the other cases or indeed as far as some of them which have decided what is a charitable purpose. But one has to remember that the Inland Revenue Commissioners themselves, in 1924, admitted that the Royal Agricultural Society, whose objects are set out in the Case, and are defined by charter, was a charity, and those objects, it appears to me, differ in no material respect from the objects of this Society. On June 28, 1924, Rowlatt J. decided that the profits of the Royal Agricultural Society, derived from its show, were subject to income tax and that it was irrelevant that it was a charity, that they were profits made from trading, and as they were not annual payments within the section they were subject to tax. By the Finance Act, 1924, which was passed on August 1 of that year, the Legislature introduced a section (s. 23) to this effect: "(1.) Any profits or gains arising to an agricultural society from an exhibition or show held for the purposes of the society shall, if they are applied solely to the purposes of the society, be exempt from income tax. (2.) The expression 'agricultural society' in this section means any society or institution established for the purpose of promoting the interests of agriculture....." It certainly does not seem to me to be an

alarming result that, whereas in the case of this Society the proceeds of the show, amounting to some 2000*l.*, devoted to the purposes of the Society, are exempt from income tax, all the income from investments amounting to some 300*l.*, devoted also to the purposes of the Society, should also be exempt from income tax, and presumably for the same reason for which the Legislature exempted the proceeds of the shows.

This is not a case where the Inland Revenue have really any good prospect of making our flesh creep, and I can view the result of this case with complete equanimity as far as the public interests are concerned. I should not have referred to this matter, for I think that on a question of construction it is irrelevant, but that it was a consideration put before us by the Crown, and therefore I think it is right to deal with it.

For these reasons I think the appeal must be allowed, and the decision of the Commissioners restored.

LAWRENCE L.J. I agree, and will only add a few observations of my own without attempting to cover the whole ground which has already been covered by the judgments of my Lords.

In my judgment the crucial question in this appeal is whether the appellant Society was established for the promotion of agriculture generally or was what has been conveniently called a members' society, established for the promotion of the interests of its members in their respective businesses. If the former be the case I am clearly of opinion that the Society was established for charitable purposes only within the legal acceptation of that expression. Agriculture is an industry not merely beneficial to the community but vital to its welfare. The fact that the operations of the Society may be confined to Yorkshire—a matter upon which I desire to express no opinion—is, in my opinion, immaterial, as it is well settled that the benefit in point of local area need not extend to the public at large and that the benefit of the inhabitants of a particular district will suffice (see per Chitty J.

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in *In re Foveaux* (1)), a proposition which the Solicitor-General did not dispute. It is plain to my mind that the general improvement of agriculture is a charitable purpose falling within the fourth class of Lord Macnaghten's well known classification of legal charities in *Pemsel's* case. (2) In expressing this conclusion I must not be understood as asserting that every purpose of public general utility is necessarily charitable in the legal sense. Although I know of no case where a trust for a specific purpose which is shown to be of public general utility has been held to be void, yet I recognize that a general trust for purposes beneficial to the community, without specifying any particular purpose, would in all probability be held to be void, because there might be some purposes of public general utility which were not charitable: see *In re Macduff*. (3) Dealing, however, with the general promotion of agriculture, which is the particular purpose here, and without going through the numerous cases decided upon other purposes, I have arrived at the clear conclusion that it comes within the spirit and intention of the Statute of Elizabeth as interpreted by many eminent judges, and probably much more within that spirit and intention than many other purposes which have been held to be charitable on the sole ground that they are for the benefit of the community. In my opinion it would require a bold advocate to contend that a bequest of a legacy or share of residue upon trust for the general promotion of agriculture was void for perpetuity or uncertainty, and the Attorney-General would, in my opinion, have an easy task in defeating the claims of the residuary legatees or next-of-kin to the fund devoted to that purpose and in obtaining an order for the settlement of a scheme for the administration of the trust.

I now come to the question which, in my opinion, is the real question in the case. The Solicitor-General and Mr. Hills have strenuously contended that this Society is a members' society in the sense I have mentioned; and if this contention

(1) [1895] 2 Ch. 501, 504. (2) [1891] A. C. 531.
(3) [1896] 2 Ch. 451.

be well founded it is, I think, clear that the Society is not one established for charitable purposes only, even although it might embrace some charitable objects. This contention is based mainly on two grounds: first, that the Society was originally founded for the main purpose of holding an annual show primarily for the pleasure and benefit of its members, and, secondly, that the Society does in fact confer privileges and personal benefits upon its members, such as are set out in para. 3 of the Case.

The first ground depends, in my opinion, entirely upon the true meaning of the first resolution passed at the meeting of October 10, 1837, which lays down the sole object for which the Society was founded. Construing that resolution in the light of the subsequent resolutions, and having regard to the nature and character of the Society then founded, it is plain to me that the only object for which it was founded was not for the purpose of promoting the interests of its members and their businesses, but for the purpose of promoting agriculture generally. The holding of an annual show which was to be open to all comers, both as exhibitors and as visitors, was no doubt to be a prominent feature in aid of the real object of the Society, but it was not intended as a device for the special benefit of its members. In my judgment the real meaning of this resolution is that the object for which the Society was established was the general promotion of agriculture by holding an annual show and otherwise.

The second ground, in my opinion, involves a confusion of thought. The objects of the Society and the inducements in the shape of personal benefits held out to persons in order to procure their membership and to obtain their subscriptions are two entirely different things. It is a common thing for a charitable institution to offer all kinds of privileges and benefits which are in no sense charitable in order to obtain funds for the purpose of carrying out its objects. As an instance I might mention the giving of dinners, dances and theatrical entertainments, all of which entail an expenditure of money on non-charitable objects incurred for the

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purpose of obtaining funds to be applied for the charitable objects of the institution. Many charitable institutions, in return for annual subscriptions or donations, offer special benefits to the persons who become their members. None of the operations of this kind results in making the purposes of the institution non-charitable. So here the fact that members obtain certain privileges in no way militates against the proposition that the purpose of the Society was a charitable purpose only. In my judgment the contention that this Society is a members' society is not well founded and fails.

I therefore agree that this appeal should be allowed and the decision of the Commissioners restored.

Appeal allowed.

Solicitors for appellants: *Trower, Still & Keeling.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

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[IN THE COURT OF APPEAL.]

THOMAS *v.* ALDERTON, LIMITED.

[1927. T. 794.]

Practice—Specially indorsed Writ—Leave to defend—Short Cause List—Amendment of Plaintiff's Claim—Power of Judge to allow—Rules of Supreme Court, Order XIV., *r.* 8 (*b*).

Although it may be a condition precedent to the Master's power to order a cause to be tried in the Short Cause List, that the claim specially indorsed on the writ should be for a liquidated demand, yet when once he has made the order giving leave to defend, and has ordered the cause to be put in the Short Cause List, there is no restriction whatever on the powers of the judge to order such an amendment as he is authorized to make under the Rules of Court.

The judge trying causes in the Short Cause List has the full powers of amendment that are given to him by the Rules of Court as though he were hearing the cause in the ordinary list.

APPEAL from a decision of Shearman J.

On May 21, 1927, the plaintiff commenced the present action by specially indorsed writ claiming 142*l.* 17*s.* 8*d.* for

services rendered in connection with the recovery of overpaid income tax.

On June 8 the plaintiff applied for judgment under Order XIV. On the hearing of the application the Master granted to the defendants leave to defend, and gave certain directions for the delivery of pleading and ordered the action to be tried before a judge alone in Middlesex. On a subsequent application the case was ordered to be put in the Short Cause List under Order XIV., r. 8 (*b*). On the case coming on for trial before Shearman J. the plaintiff applied for leave to amend his claim by including a claim for unliquidated damages for breach of contract. Shearman J. refused to allow the amendment on the ground that the claim being one under Order XIV. he had no jurisdiction to allow the proposed amendment, and held upon the facts that the plaintiff's claim for 142*l.* 17*s.* 8*d.* failed and must be dismissed. The plaintiff appealed. The facts are more fully stated in the judgment of the Master of the Rolls.

The appeal was heard on November 18 and 21, 1927.

Moresby for the appellant.

J. B. Melville K.C. and *Frank Powell* for the respondents.

LORD HANWORTH M.R. This is an appeal which incidentally raises a matter of some importance. The action was brought by writ, which was specially indorsed, for an agreed fee for services rendered by the plaintiff to the defendants, and it was specially indorsed for the purpose of complying with Order III., r. 6. In consequence of that condition being fulfilled, an application was made under Order XIV. for judgment against the defendants. On June 8, the writ having been issued on May 21, 1927, the hearing of the summons under Order XIV. took place. It was ordered that the defendants should have liberty to defend the action, and thereupon the Master quite rightly dealt with the matter, as he was entitled to do under Order XXX., r. 1 (*c*), which provides that: "Where under Order XIV. the plaintiff applies for judgment, the judge may deal with such application as if the plaintiff had been entitled to take out and had taken

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out a summons for directions," and by r. 1 (*a*) of the same Order: "Except in the cases mentioned in paragraph (*d*) the plaintiff in every action shall take out a summons for directions returnable in not less than four days." Order XXX. therefore by those two paragraphs requires that the proceedings, if leave to defend is given, shall be conducted under the directions which are to be given as in an ordinary action. The Master's order, after giving liberty to defend, ordered that a defence should be delivered in fourteen days and a reply in ten days afterwards, and after a provision as to an affidavit of documents further ordered that the action should be tried at Middlesex by a judge alone. After that a suggestion was made by the plaintiff that it would be necessary for him to amend his claim, and he accordingly took out a summons asking that he should be at liberty to do so, but on June 29 when that summons came on for hearing the plaintiff in effect abandoned it, with the result that an order was made, on his application, that the defendants should be at liberty to defend. No order was made as to costs, except that the costs of the application should be the defendants in any event. A further application was then made, that instead of the trial taking place, as had been ordered, at Middlesex with a judge alone, there should be a trial in the list which is specially reserved for cases that are dealt with under Order XIV. On July 14 the case came before Shearman J., and an application was then made to him for leave to amend the claim. The order for trial made in May was under Order XIV., r. 8 (*b*), which provides that: "A special list shall be kept for the trial of causes in which leave to defend has been given under this Order," and inasmuch as Shearman J. was trying it under that Order he took this view. He said: "This case comes here on the basis that it is an Order XIV. claim, a claim for a liquidated sum, and not a claim for damages. I say on the pleadings and the Order, that this claim for a liquidated sum fails, and therefore this action must be dismissed as it stands." He refused, therefore, to allow any amendment, but his judgment also contemplates that he had not concluded the matters open between the

parties, for he added: "I make no reference at all to another plea which was not on the pleadings, beyond saying that even if I had the power, one reason why I should refuse to amend here is because it may very well be under the circumstances in another action the defendants might want to put up a different plea to the one now put up."

The effect of that judgment is this: refusal to amend, contemplation of further action between the parties, but in fact judgment given in the action in favour of the defendants, and with the contemplated possibility that there still is a further cause of action which, if an amendment had been allowed, could have been introduced into the present action, and that is to stand over to be litigated by new proceedings commenced by a new writ between the parties.

It is from that judgment and under those circumstances that the plaintiff appeals, and he relies upon Order XXVIII., r. 1, which provides that: "The Court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." Subject of course to the discretion as to whether it was appropriate that some amendment could be made or the terms upon which it was to be made, it would appear that the intention of the rule was to provide that in all cases amendments are to be made in order to reach finality between the parties. That result has not been secured in the present action. It appears to me that the judge misunderstood the effect of the order made under Order XIV., r. 8, under which the case was put into a special list. It is wrong to speak of an Order XIV. case as if, when once leave to defend has been given, there still was some characteristic applicable to the action which differentiated it from all other actions. In order that an application for a summary judgment may be made it is necessary that certain conditions should be fulfilled, and the important one is that there should be a special indorsement under Order III., r. 6. Then it is possible to

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make the application for a summary judgment, but if that application fails and leave to defend is given, the action which has been commenced is just as much an action as any others, and Order XXVIII., r. 1, applies to it. It must not be forgotten that the procedure under Order XIV. was not newly invented when that Order was first introduced into the Rules of Court. The system of summary judgment was first established in respect of bills of exchange under the Act of 1855, which is known as Sir Henry Keating's Act (18 & 19 Vict. c. 67). That Act enabled judgment to be given in an action brought on a bill of exchange, unless the defendant paid the sum indorsed on the writ into Court or set up the nature of his defence in an affidavit, so that the judge could form an opinion not only as to its validity in point of law, but as to its bona fides in point of fact. The system of Order XIV. is an enlargement of that summary procedure, but it does not connote that the actions in respect of which an application for summary judgment can be made are different in nature from other actions, and so far as the action proceeds it proceeds as an action to which the Rules of Court apply. This, I think, is made quite plain when one contemplates Order XXXVI., r. 1, which shows that those actions which have escaped determination under the provisions of Order XIV. and are standing to be tried, must be dealt with similarly to other actions. Order XXXVI., r. 1, provides that: "The order made on the summons for directions in every cause or matter, and every order giving leave to defend under Order XIV., shall direct whether the cause or matter is to be tried with a special jury, or with a common jury, or without a jury . . . . and shall also direct where the cause or matter is to be tried." It once more brings back the cases in respect of which an application for summary judgment has been made, if that application fails, into alignment with other actions which are brought by a writ not specially indorsed.

After making those observations it appears to me that Shearman J. misunderstood his powers in relation to this action. I think he was not unnaturally much influenced by the plaintiff's own conduct in withdrawing his application

for leave to amend and inconsistently renewing it at the trial. It is plain that there are still matters to be litigated between the parties, and we are of opinion that an amendment must be allowed.

The result will be that the appeal must be allowed and leave must be given to amend, but on terms. It is right that directions should be given in this action, so that the plaintiff may make up his mind how to proceed and that the defendants may have an opportunity of placing their defence before the Court. I ought to have observed that in the defence which was put in after leave to defend had been given, an alternative plea was inserted in that defence by making a payment into Court. If the action was treated as one in respect of which there could be no amendment and the claim was confined closely to what had been specially indorsed on the writ, a payment into Court by way of an alternative seems to have been an embarrassing plea; that appears to indicate that from the defendants' point of view they realized that there might be some alternative claim made to that which had been specially indorsed, and they wished to arm themselves with a defence in respect of it by a payment into Court. Still the defendants have not lost the right to amend their defence in order to meet any amendments made by the plaintiff.

The order therefore will be: Appeal allowed; leave to amend, the amendment to be made within seven days; liberty to the defendants to amend their defence within ten days after the delivery of the amended statement of claim; trial by judge alone; and the defendants to have the costs thrown away by reason of the new amendment which is made. The costs of and occasioned by the amendment must be the defendants; as to the costs of the trial and the costs of this appeal those will be left to the judge at the second trial.

ATKIN L.J. I agree. The question of general importance in this case is the question whether the judge who is trying a case which has been put in the Short Cause List under

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the order of the Master, made under the power of Order XIV., r. 8 (*b*), has jurisdiction to amend the plaintiff's claim so as to include an unliquidated claim. The judge in this case has held that he had no such jurisdiction. In my opinion that is a mistaken and too restricted a view of the jurisdiction of the judge. It may be that it is a condition precedent to the Master's power to order a case to be tried in the Short Cause List under Order XIV., r. 8 (*b*), that the claim specially indorsed on the writ should be for a liquidated claim. I do not say anything at all about that, but once he has made the order and given leave to defend and has ordered the case to be tried in the Short Cause List, there is, in my opinion, no restriction whatever on the powers of the judge to order such an amendment as he is authorized to make under the Rules of Court, and those powers are very wide. It appears to me on one wording of them that they are peremptory, that all amendments shall be made that are necessary to determine the true issue between the parties. Whether that is so or not I propose to state in this judgment what I am satisfied is the opinion of the Court—namely, that the judge trying such a list has the full powers of amendment that are given to him by the Rules of Court as though he were hearing the case in the ordinary list.

I do not deal with the further details of the case, because it appears to me unnecessary to add anything to what has been said by the Master of the Rolls. I agree that this appeal should be allowed, but I think in the circumstances of this particular case that the plaintiff has caused a great deal of the embarrassment that has arisen, and that it is right therefore that the costs of the former trial and the costs here should be subject to the discretion of the judge who hears the case, who can then determine how much of them or whether all of them are to be borne by either party.

LAWRENCE L.J. I agree, and I have nothing to add.

Appeal allowed.

Solicitor for appellant: *H. G. Taunton.*

Solicitors for respondents: *Bateman & Co.*

W. I. C.

[IN THE COURT OF APPEAL.]

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1927
Nov. 25.

MAXWELL *v.* KEUN AND OTHERS.

[1926. M. 3062.]

MAXWELL *v.* KEUN AND OTHERS.

[1926. M. 3063.]

Practice—Trial of Action—Plaintiff an Officer in Army serving in India—Application to postpone Trial to enable Plaintiff to attend—Order dismissing Application with Costs—Appeal—Discretion of Judge—Interference with, by Court of Appeal—"Order"—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 27, *sub-s.* 1—*Rules of Supreme Court, Order* XXXVI., *r.* 34.

An order made by a judge dismissing an application to postpone the hearing of an action in his list and ordering the applicant to pay the costs is a "judgment or order" within the meaning of s. 27, sub-s. 1, of the Judicature (Consolidation) Act, 1925, from which an appeal lies by leave to the Court of Appeal.

The Court of Appeal ought to be very slow to interfere with the discretion vested in a judge by Order XXXVI., r. 34, with regard to such a matter as the adjournment of the trial of an action before him, and very seldom does so; but if it appears that the result of an order refusing such an adjournment will be to defeat the rights of the applicant altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, the Court has power to review the order, and it is its duty to do so.

Rule laid down in *Sackville West* v. *Attorney-General* (1910) 128 L. T. Journ. 265 applied.

APPEALS from two orders of Lord Hewart C.J.

The plaintiff, Ernest Cassel Maxwell, was an officer in the Army, at present serving in India. In October, 1926, he commenced the present actions, Nos. 3062 and 3063, against the first defendant Odette Keun in respect of alleged libels contained in two books written by her. The other defendants to the actions were the respective printers and publishers of the books. Action No. 3062 was in the special jury list, and was about 106 out of that list. Action No. 3063 was in the same list, but was expected to be in the daily list almost immediately. Applications had been made to the Lord Chief Justice to allow both actions to be adjourned until a date to be fixed in the future, in order to enable the plaintiff

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to obtain leave from the Army to return to England for the hearing. The Lord Chief Justice had refused the applications with costs.

The plaintiff appealed against the refusal of both applications.

The effective appeal was with reference to action No. 3063. The following statement of the facts of that action is taken from the judgment of the Master of the Rolls :—

" The action which is before us, and in which an effective appeal is made to this Court, is one the notation of which is [1926. M. No. 3063]. It is an action brought by an officer in His Majesty's Regular Army and now in command of the 1st Battalion of the Cheshire Regiment stationed in India. The facts are not in dispute that he is now in India, and that it will be impossible for him to reach this country, even if a cable were sent to him, in the lapse of less time than one month from to-day. He commenced his action by writ dated October 12, 1926, and he complains in that action that the first defendant published of him in December, 1923, and in January, 1924, a libel. It is said that that libel was contained in a book entitled " Prince Tariel," which was represented as being a true story. In that book reference was made to a certain Major Cassel, and the plaintiff's case is that he was the officer who was intended to be understood as " Major Cassel," and that any persons who read the book with any knowledge at all would clearly understand and appreciate that the references in the book to " Major Cassel " were references to the plaintiff.

" There are a number of extracts set out in the pleadings, and also the book contained a picture, of a person who acted very cruelly to a woman ; and the allegation is that by the words in the book and the picture the defendants were understood to mean, and meant, that the plaintiff was indicated, and that he had acted in a manner quite unworthy of the position which he had the honour to hold.

" The first defendant Odette Keun was the authoress, Messrs. Jonathan Cape, Ld., were the publishers, and Messrs. Butler & Tanner, Ld., were the printers.

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"Now, I think it is quite plain that if the plaintiff is to have an opportunity to succeed in his action it is essential that he should be present at the trial and be able personally to give evidence. I have said the writ was issued on October 12, 1926, and in the course of the proceedings in that action the defendants, Jonathan Cape, Ld., became justified in serving a notice of trial, and they did so in the middle of May last. As against the other defendants a notice of trial was served by the plaintiff, although it is said it was unnecessary for him to do so, on October 4; but after looking at the dates of the proceedings in the action down to the time when the notice of trial was given to the defendants, Butler & Tanner, Ld., although greater zeal might have secured greater speed I do not think any serious criticism is to be made as to the course of proceedings taken in that action.

"It appears that the action is but seven cases out of the list of cases which are to be heard during the course of next week; in other words, it is likely to come on before this term closes. An application was made to the Lord Chief Justice of England on November 23 that the case should stand out of the list, because it would be impossible for the plaintiff to be present, and the learned judge decided to make no order. Yesterday the application was renewed, and Sir Henry Maddocks urged that the case should be taken out of the list so that an application could be made for a date to be fixed which would be convenient not only to the plaintiff, but also to the Court, because there is another action, No. 1926. M. No. 3062, which the same plaintiff is bringing against the same first-named defendant, but in which the other defendants are the Bodley Head, Ld., and Butler & Tanner, in that action sued as a firm. The Lord Chief Justice, on November 24, decided not to grant the application. The result is that this action, No. 3063, is in grave peril of coming into the list for trial at a time when the plaintiff will be quite unable to be present. If that should happen, in my view, and upon the materials before me, it appears that there is no possibility of the plaintiff's case being

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established in the absence of the plaintiff himself, and judgment would have to pass to the defendants subject to certain matters which might have to be discussed and adjusted.

"From that decision of the Lord Chief Justice of England an appeal is brought to this Court."

The appeal was heard on November 25, 1927.

Sir Henry Maddocks K.C. and *Linton Thorp* for the plaintiff.

Norman Birkett K.C. and the *Hon. S. O. Henn Collins* for the defendants Jonathan Cape, Ld. We take the preliminary objection that no appeal lies from the decision of the Lord Chief Justice. By s. 27, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, the Court of Appeal has jurisdiction to hear and determine appeals "from any judgment or order of the High Court," and here it is submitted there has been no "judgment" or "order," but merely a refusal by the Lord Chief Justice to alter his list. By Order XXXVI., r. 34: "The judge may, if he thinks it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he shall think fit." That rule gave the Lord Chief Justice an absolute discretion to deal with his own list, and that discretion having been judicially exercised, the Court of Appeal ought not to interfere.

Croom-Johnson K.C. and *Michael Hoare* for the defendants Butler & Tanner, Ld., *St. John Field* for the defendants John Lane, the Bodley Head, and *Michael Hoare* for Butler & Tanner sued as a firm, took the same preliminary objection.

Sir Henry Maddocks K.C. referred to *Sackville West* v. *Attorney-General.* (1)

The Court overruled the objection, and the hearing of the appeal on the merits was then proceeded with.

[*Jones* v. *S. R. Anthracite Collieries, Ld.* (2); *Steuart* v. *Gladstone* (3) were also referred to.]

LORD HANWORTH M.R. This is an appeal which appears to raise a question of practice of some importance, but in the

(1) 128 L. T. Journ. 265. (2) (1920) 90 L. J. (K. B.) 1315.
(3) (1877) 7 Ch. D. 394.

view we take it is so exceptional that I doubt whether it is of serious import with regard to the regular practice. [His Lordship then stated the facts with regard to action No. 3063 as above set out and continued :] First of all, a preliminary objection is taken to this Court hearing any such appeal, on the ground that the order which was made by the Lord Chief Justice was not of the nature of an order which is subject to appeal in this Court. It is said that in fact the Lord Chief Justice determined to make no order, and that s. 27, sub-s. 1, of the Judicature (Consolidation) Act, 1925, which refers to matters of appeal, deals with appeals from a judgment or order of the High Court ; but the order of the Lord Chief Justice directed that the costs of the application should be paid by the applicant to the respondents ; and although it is not uncommon that no order should be drawn up upon that, the attachment of an order as to costs to the decision makes it, in my judgment, plain that the order in fact made was one which was of a character which is embraced within the sub-section. Although such an order may be appealable, it by no means follows that such appeals ought readily to be entertained, or that there is any promise of success in bringing such a matter from the Court below to the Court of Appeal.

It is obvious—indeed, it is almost an essential of our system and practice—that the discretion of a judge should be not only respected but upheld ; and in Order XXXVI., r. 34—if, indeed, a rule were necessary—it is plainly said that "the judge may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he shall think fit." It is said, and said cogently, that, inasmuch as the Lord Chief Justice is armed with that discretion, the Court of Appeal ought not to interfere with the discretion exercised judicially ; that this discretion was exercised judicially ; that in a matter of what cases should be in the list to be tried by him it must surely be a matter for the judgment of the Lord Chief Justice ; and that, even if there be an appeal, this Court ought to have respect for the discretion appropriately exercised.

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With these arguments I agree. It is obvious that there must not be any attempt to interfere with the discretion of the learned judge in reference to the trial. It is most important that we should uphold that discretion. But *Sackville West* v. *Attorney-General* (1), to which our attention has been called, gives an illustration that, although it is only on very rare occasions that the discretion of a learned judge will be interfered with, yet that there may be such occasions. It is a decision of the Court of Appeal, and therefore one which is binding upon this Court. The statement is made in the judgment, which is a judgment of Cozens-Hardy M.R. and Moulton and Buckley L.JJ., that, "although it could not be said that under no circumstances would the Court of Appeal be justified in interfering with the discretion of the learned judge in a Court below as to the proper mode and time of trying an action, yet it would only be in the most extraordinary circumstances that an application to review the decision of the learned judge as to the conduct of the business in his own Court could succeed; that the only case in which the Court of Appeal would so interfere would be if satisfied that the decision was such that, notwithstanding any exercise by the learned judge of the power of control which he would have over the action when it came on for trial, justice did not result, and he had failed to see that such would be the effect of his decision."

Now, I desire closely to follow and respectfully to agree with that statement of the principles on which the Court ought to act, and I ask myself, in the present circumstances, what will happen if the order stands, or, rather, if no order is made and the case comes on for trial this term. There is no dispute as to the facts. Mr. Norman Birkett has fairly said that he accepts the facts as to the plaintiff's absence and the difficulty of his immediate return, as I have stated. If the case is tried this term and the plaintiff is absent, I think the result would be judgment for the defendants and the plaintiff's action would fail, at any rate the major part

(1) 128 L. T. Journ. 265.

of it, and that in spite of any order that could possibly be made by the learned judge before whom the case came this term. That failure would be due to the absence of the plaintiff, and no power of any learned judge could overcome that difficulty. Then what would be the result? Could it be said that in the absence of the plaintiff justice had been done between these parties, that, whoever may be right and whoever may be wrong in the case, the partial hearing offered by the appearance before the tribunal of the defendants would be sufficient and the non-appearance of the plaintiff would not affect the result of the trial, and the result, in the sense of effecting an injustice?

Now, it appears to me that this case, as presented to us after full argument by learned counsel representing all parties, and after a hearing which has occupied more than two and a half hours, presents features which could not have been present to the Lord Chief Justice of England at the time when the application was made to him. But it is said that the right course is to accept the discretionary order, or absence of order, and to leave the case to come into the list this term, and that then an application should be made stating that the plaintiff is in India, that he cannot be here at the trial, and that, owing to his absence, the case should be adjourned. It is to be observed that that course is an inconvenient and an expensive one, and, further, that it would be open to the defendants, and I think it would be their duty to point out, if such an application were then made before the learned judge sitting for the trial of the case, that a similar application had been made not once but twice before the Lord Chief Justice, and that a similar application had been made by way of appeal to the Court of Appeal, and on those three several occasions refused. I can well believe the learned judge at the trial would in those circumstances say that he could not allow any adjournment; there would be no new facts before him that were not known to the Court at the present time. I do not think, therefore, that that course is a right or proper course. We are told that the decision of the Lord Chief Justice was influenced by the

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delay which had taken place. If that be so, perhaps I am wrong in not seeing much ground for attributing delay to the plaintiff. It is plain that an application at an earlier stage could have been made, but the application would in its nature have been the same, and even if it had been made a week or two, or even more, earlier, the same difficulty as to the plaintiff's attendance would have emerged, and also the difficulty which he is under if he is to have the right of having both these cases, No. 3062 as well as No. 3063, tried at a time when he is able to attend.

I have the deepest respect for the Lord Chief Justice of England, and for his discretion, but, applying the rule which has been laid down by this Court, which I am bound to apply, it appears to me, upon the facts before us—indeed it has been made plain—that justice would not result if this case were left in the list, that the trial judge would not be able to alter that result, that this case ought not to be allowed to be left to the trial judge when it comes into the list, and that the only right course is to apply the rule in *Sackville West* v. *Attorney-General* (1) and to say that an order must now be made that this case, No. 3063, is not to be heard this term, and that will be sufficient. There can be an application made in the one case or in the other, or in both, as the parties may be advised. I desire to say nothing which would in any way prejudice those applications if they are made; but the order which we propose to make in No. 3063 will be one which will prevent the case coming on this term, without making any further direction at all.

With regard to the action No. 3062, it is unnecessary to make any order at all; that case stands at some distance away. I have not referred to it, as it is unnecessary for the purpose. We think the application in reference to it is misconceived.

Therefore, so far as the notice was given to the defendants John Lane, the Bodley Head, and Butler & Tanner sued as a firm, that appeal must be dismissed with costs in any event. Translating that into simple words it means that

(1) 128 L. T. Journ. 265.

the defendants in action No. 3062 will get their costs in any event for their attendance here to-day.

With regard to the other case the order will be: the case to stand out of the list and not be heard this term. The costs will be costs in the action.

ATKIN L.J. I agree, and I should not have added anything to what has been said by the Master of the Rolls if it were not that we are differing from a decision of the Lord Chief Justice, and it is usual and, indeed, proper in those circumstances for a judge to give his own reasons for his dissent from the decision below.

In this case an application was made to postpone the hearing of a case which was in the week's list, and because it was in the week's list it was made before the Lord Chief Justice, who, in accordance with practice, was in charge of the special jury list for the week. Authority to make an order or to grant an application is given by Order XXXVI., r. 34; and the Lord Chief Justice, on hearing the application, dismissed the application with costs. I need say nothing further on the first point, except that I am quite satisfied that that is an order of the learned judge from which an appeal lies by leave to this Court.

The other point that was made by the defendants was that this was a discretionary order, and that the Court of Appeal ought not to interfere with the discretion of the learned judge. I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so.

I will refer to one case in addition to that which was referred to my Lord, that is *Jones* v. *S. R. Anthracite Collieries, Ld.* (1) That was a decision of the Court of Appeal

(1) 90 L. J. (K. B.) 1315.

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in a workman's compensation case. There the county court judge had refused to adjourn an application when the manager of the respondents had on subpœna failed to produce certain documents which were said to be relevant. The applicant had applied for the adjournment, the county court judge had refused to grant it, and the Court allowed the appeal. In that case Lord Sterndale M.R. said (1): "I think it was rather suggested that this Court has never interfered with any judge's decision in regard to the granting of an adjournment. I cannot remember any specific instance of this Court doing so, but my impression is that this Court has interfered with the decision of even High Court judges in regard to 'adjournments'—although, as I say, I cannot remember any specific instance of that being done at the moment." In the same case Scrutton L.J. said (2): "I should like to say, in regard to the point as to whether the Court has ever interfered with the decision of a county court judge as regards an adjournment, that my impression is the same as that of the Master of the Rolls. My impression is that this Court has frequently interfered with the decisions of county court and High Court judges in regard to the question of 'adjournment,' because the whole duty of this Court, and of every Court, should be to do justice between the parties without being prevented by technical objections." I myself am certainly of that impression. I have a definite recollection of a case, which can be referred to if necessary, where this Court has interfered with a decision of a judge refusing to adjourn a case, if it thought that thereby a real injustice would be done to the parties. That is the issue in this case, and in order to determine that question it does seem to me to be relevant to dwell for a moment or two upon what the somewhat peculiar facts are in this case.

There are here two cases brought by the same plaintiff who is an officer in His Majesty's Army, and is now stationed in India in command of his battalion. He complained of a libel contained in two books written by a foreign authoress and published by different firms of publishers. The first

(1) 90 L. J. (K. B.) 1316. (2) 90 L. J. (K. B.) 1317.

case, which is not the case with which we are now concerned, is one in which the libel complained of is in a book which did not purport to be a work of fiction, and was styled, "My Adventures in Bolshevist Russia," and in which the plaintiff, who is Ernest Cassel Maxwell, and who is now a colonel but was at one time a major in command of the Allied Police at Constantinople, is referred to by name over and over again as "Major Cassel," the head of the British Military Police, and words are used in reference to him which are quite plainly defamatory, and are admitted by the defendants to be defamatory, and in respect of which their only defence is that they have paid a substantial sum into Court as damages, admitting liability. That action, though the defence is, as I have said, an admission of liability and only raises the question of damages, has only been set down rather lately, and is now about 100 out of the list. The other action is an action brought against the same authoress, who does not appear in either action, and a different firm of publishers. The plaintiff's name, as I have said, is Ernest Cassel Maxwell, and it is in relation to a libel contained in a work of fiction called "Prince Tariel," written apparently after the former work, in which work there appears a "Major Cassel," who is in that work described as head of the Intelligence Department of the British Mission in Georgia. The plaintiff says that in that work he was referred to in reasonably plain terms as in the other work written by the same authoress who had admittedly libelled him in the first work, and who now depicted a character under a name which is the plaintiff's second name and giving him his proper military title, and that is the action which is the subject-matter of this application.

The writs in both of these actions were issued on the same day in October, 1926. The proceedings did not quite synchronize, because, whereas the undefended case proceeded very slowly with a number of interlocutory applications with reference to the statement of claim, and so forth, so that the case was only set down in October, the defended case proceeded very rapidly, and the defendants, the publishers, gave notice of trial themselves about ten days later, so that

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the action appears in the list much earlier than the other one. It is to be noticed, therefore, that that action has been, I do not say expedited, but has been brought into the list early by the action of the defendants, who gave notice of trial at a time when they knew that the plaintiff in fact was performing his military duties in India. The action has come into the list, and no application was made by the plaintiff for the postponement of the case until this week, and objection is taken that he has been guilty of such delay that he is properly punished by losing his right to protect himself from this libel or to claim damages in respect of it, because it is hardly disputed, and if it were disputed it is beyond controversy, that if this case comes on next week in the absence of the plaintiff it would be quite impossible for his advisers to proceed, and the only result would be that judgment would be given for the defendants and the plaintiff would be deprived of his right.

It appears to me, in dealing with the question of delay, it is impossible to omit to notice both actions. Here the plaintiff had brought two actions both against the same authoress, against different publishers, and against the same printers; the only difference being that in one case the printers were a firm and in the other they were in fact a limited company. The same issue would arise as far as they were concerned; they appear by the same advisers and by the same counsel. It appears to me obvious that the duty of the plaintiff in this respect was to try to secure that, if he had to come here for his private affairs in order to deal with these two actions, he should be able to make arrangements that the two actions should be heard at about the same time so that they would be covered as nearly as possible by the same period of leave. I myself have very little doubt that that is the view the authorities would take. I can hardly imagine any one would think it was reasonable that this gentleman should apply for leave to come and fight an action dealing with very much the same subject-matter in December, and that he should then go back to join his regiment, and then he should have to apply to come back again to conduct a

similar action in April; and if he applied for leave to cover a period which would comprise the whole interval between the two actions, the obvious thing that would be said to him would be, "Why have not you taken some step to secure that the actions should be heard together?"

In those circumstances, it seems to me that it was perfectly reasonable for the plaintiff to wait until both actions were at any rate set down for trial; and the second action was not set down until about October of this year. After that I have very little doubt that communications would have to be made with the plaintiff by his advisers, which might quite easily explain a lapse of some six weeks or so since the beginning of the term. Whether that is so or not, it appears to me impossible that the plaintiff should be punished by losing his rights altogether in a case where his advisers have been guilty of a delay of, say, five or six weeks in making this application. I do not take the view that this application could have been made in May or June or July of last term. I think it would be an extraordinarily difficult application to make until the other action was in the list.

The result of this seems to me to be that in the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion. I am very far from being satisfied that that is so in this case; on the other hand, I am quite satisfied that very substantial injustice would be done to the plaintiff by refusing the application that this case should be postponed, and that that is the result of the present order.

It appears to me we should now make the order which, upon a fuller consideration of the materials that had been before the Lord Chief Justice, ought to be made. The result is that this case ought not to be heard this term. I think the proper course to take is to direct that it should be taken out of the week's list, and not be tried until next term. That will give an opportunity to the parties to make the necessary

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application, which they can make in Chambers, for a proper order dealing with the trial of this action and of the other action so, at any rate, to secure that the two actions shall come on together within such a reasonable period of time as will enable them to be covered in one reasonable period of leave which the plaintiff, we are told, will be able to obtain. It is obvious the actions cannot be heard together in the sense that the evidence in one will be the evidence in the other. It may be thought desirable by the learned judge who tries the actions that they should be heard one after the other. In that way probably a considerable expense will be saved, certainly to the plaintiff and possibly to some of the defendants; but that is a matter for further application. On the footing that such an application will be made, and some reasonable order suiting the interests of all parties will be made, I think we ought to make the order proposed by my Lord.

With regard to the second action, it seems to me that it was unnecessary to apply for a postponement of it, because the action, we are told, is about 100 out of the list, and it is quite easy to make an order, and in the circumstances it would not be an unusual thing to do so, which might to some extent expedite it, but it is quite unnecessary at the present time to make an order to postpone the hearing of that case, and I agree with the order proposed by my Lord with reference to that.

LAWRENCE L.J. I agree. No words of mine are really needed to emphasize the reluctance of this Court to interfere with a discretionary order such as the one now under appeal. This Court never interferes with the discretion of a judge below in arranging his list or in fixing the time for trying any cases before him unless that discretion is exercised so as to result in a denial of justice.

Now, what are the facts here? The plaintiff is in India with his regiment; it is not suggested that he is unable or unwilling to come to England and to be present at the trial so as to support his case in the witness box when it comes

on. Further it is plain that if he is not present at the trial his case must fail, in other words, he will not have had an opportunity of having his case properly tried and thus of obtaining justice. I will assume for this purpose that his advisers committed an error of judgment in applying for the postponement of the trial at the time when they did, and that they ought to have applied some weeks earlier. I cannot myself think that the penalty for that error of judgment is that the plaintiff should not have his case properly tried. I have heard no word said on behalf of the defendants that they will in any way be prejudiced by the case being postponed until next term, and there is no evidence whatever that they will be prejudicially affected by such a postponement. It seems to me that, in those circumstances, it would be denying justice to the plaintiff if his case were allowed to remain in the list of cases to be heard this term.

I agree with the orders proposed by the Master of the Rolls.

Appeal allowed. (1)

Solicitors for plaintiff: *Thorp, Saunders & Thorp.*

Solicitors for defendants: *Field, Roscoe & Co.; Warwick Webb, Son & Co., for Collins, Moger & Hughes, Bath; Trower, Still & Keeling.*

(1) The action was tried before Avory J. with a special jury on February 1 and 2, 1928, when a verdict was returned for the plaintiff for 1000*l.*, and the second action was subsequently, on February 16, 1928, settled for an agreed sum.

W. I. C.

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Jan. 19, 20.

[IN THE COURT OF APPEAL.]

MESSAGER *v.* BRITISH BROADCASTING COMPANY, LIMITED.

Copyright—Opera—Broadcasting—"Perform . . . . in public"—Theatrical Producer—Contract—Licence or Assignment—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 1, 5.

Decision of McCardie J., reported [1927] 2 K. B. 543, so far as it decided that the agreement by which the plaintiff granted certain rights in the music of the opera, "The Little Michus," gave the grantee a mere licence personal to himself, reversed on the construction of the document.

APPEAL from a decision of McCardie J.

The plaintiff, M. André Messager, claimed an injunction to restrain the defendants, the British Broadcasting Company, Ld., from infringing his copyright in the opera "The Little Michus," and damages. The opera was produced at Daly's Theatre, London, under a contract, which was in the following terms :—

"Memorandum of agreement made this 23rd day of March, 1905, between André Messager, Albert Vanloo and Georges Duval, all of Paris (hereinafter called 'the licensors'), of the one part, and George Edwardes, of Daly's Theatre, London (hereinafter called 'the licensee') of the other part. Whereas the said André Messager is composer and the said Albert Vanloo and Georges Duval are the authors of the comic opera in three acts entitled, 'Les Petites Michus' (hereinafter called 'the play,' which expression shall comprise both words and music), and whereas the licensors have delivered the play to the licensee together with the full score of the music thereof with a view to its being produced by the licensee at Daly's Theatre and elsewhere on the terms hereinafter mentioned. Now it is hereby agreed as follows :—

1. The licensors hereby grant the licensee the sole and exclusive right of representing or performing the play in the United Kingdom of Great Britain and Ireland, America, and the British Colonies and Dominions.

2. The copyright in the music of the play shall remain the property of the said André Messager, and he shall be at liberty to use the English lyrics for sale with the music.

3. The play shall be adapted for the English stage at the expense of the licensee.

4. The licensee shall in consideration of the rights hereby granted pay to the licensors the following royalties or fees: (*a*) Four per cent. of the gross receipts up to 800*l*. and 6 per cent. of the gross receipts over that amount for London and New York, and half of these amounts for all other towns, with the exception of No. 3, or fit-up, towns, the fees of which are to be one-fourth of London and New York, such fees, in the case of the United Kingdom of Great Britain and Ireland, to be paid weekly, and, in respect of America and the British Colonies and Dominions, monthly.

5. If the play be not produced in London by the said George Edwardes within three months from this date, all rights of representation as aforesaid shall revert to and become again the absolute property of the licensors.

6. The licensee agrees not to interpolate into the score any piece or number not composed by the said André Messager without the said André Messager's permission, but the said André Messager agrees to furnish and compose such alterations and additional numbers required for the English version as the said George Edwardes may reasonably require.

7. The said André Messager shall assist at such rehearsals as may be agreed and shall conduct the orchestra on the occasion of the first production of the play at Daly's Theatre aforesaid.

8. Proper books showing the gross receipts of the theatre or theatres at which the said play shall be represented shall be kept by the licensee, and the licensors or their agent duly authorized in writing shall be entitled at all reasonable times to inspect the said books and all vouchers, accounts, and other documents relating to the said receipts so as to enable the licensors to verify the amount of percentage payable to them as aforesaid."

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Mr. Edwardes, the licensee, produced the opera. He died in 1915, and in May, 1920, his executors assigned in writing to George Edwardes (Daly's Theatre), Ld., "so far as they lawfully could," the benefit of the contract with the licensors.

In October, 1926, George Edwardes (Daly's Theatre), Ld., in consideration of a payment of 60*l.*, granted to the defendants the right to give a broadcast performance by wireless telephony of "The Little Michus." Of this the plaintiff was not informed and his assent was not obtained. Pursuant to the permission so granted, the defendants gave a broadcast performance of substantially the whole opera on November 10, 1926, and this the plaintiff contended constituted an infringement of his copyright.

McCardie J. held (1.) that to broadcast an opera by wireless telephony was to "perform" it "in public" within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911; (2.) that the licence granted to Mr. George Edwardes was personal to himself, and could not therefore be assigned; (3.) that the broadcast performance was given without lawful licence of the plaintiff and infringed his performing rights; and (4.) that the plaintiff was entitled to damages, which were assessed at 150*l.*

The defendants appealed.

Sir Duncan Kerly K.C. and *Trevor Watson* for the appellants.

The Hon. S. O. Henn Collins, *A. J. Duhamel* and *K. E. Shelley* for the respondent.

[It was not now contended by the appellants that a broadcast performance by wireless telephony did not constitute a performance of the play "in public" within s. 1, sub-s. 2, of the Copyright Act, 1911, but it was argued on their behalf that, on its true construction, the agreement of March 23, 1905, was not a mere licence personal to Mr. George Edwardes, but was an assignment which his representatives could lawfully assign to George Edwardes (Daly's Theatre), Ld., by whom permission to broadcast the play was granted to the appellants. It is considered unnecessary in those circumstances to set out the arguments or to report the case in full.]

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The Court (SCRUTTON and ATKIN L.JJ. and EVE J.) allowed the appeal, as in their opinion it was impossible to say that the agreement of March 23, 1905, was a mere licence. That document, properly construed, conferred rights upon Mr. George Edwardes, which were not merely personal to himself, but rights which he could assign, and, consequently, his executors had power to grant the permission under which the appellants gave their production. Further, to take the view which the respondents contended for—namely, that the right of representation conferred by the agreement of March 23, 1905, was limited to performances in theatres only—was to place too narrow a construction on the terms of the document.

Appeal allowed.

Solicitors for appellants: *Steadman, Van Praagh & Gaylor.*

Solicitors for respondent: *Gery & Brooks.*

J. S. H.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1927 *April* 27; *May* 3, 10.

C. A. *June* 21, 22, 23, 29.

HARDIE AND LANE, LIMITED *v.* CHILTERN AND OTHERS. (1)

SAME *v.* SAME.

[1926. H. 3495.]

Trade Union—Unregistered—Certificated—Action of Tort against three Defendants personally and as representing Trade Union—Prohibition—Trade Union of "workmen or masters"—Trade Union for imposing restrictive Trade Conditions—R. S. C., Order XVI., *r.* 9—*Trade Disputes Act,* 1906 (6 *Edw.* 7, *c.* 7), *s.* 4, *sub-s.* 1.

An association of motor dealers and manufacturers, being an unregistered trade union certified under the Trade Union Act, 1913, had for its object the protection of the motor industry and the interests of manufacturers, sellers and users of motor goods. The plaintiffs, who were members of the association, brought an action against three of the other members who were named twice over and were sued "on their own

(1) The publication of this case has been delayed by the lamented death of the Reporter.

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behalf and on behalf of all other members of the association " for damage alleged to have been caused to the plaintiffs by the conspiracy and fraud of the defendants, as the result of which the plaintiffs were induced to sell a motor car at a price below that to which the association had granted protection, thereby breaking a by-law of the association, and were then coerced under a threat of having their names inserted in the stop list of the association to pay to the defendants a sum of money. The defendants were not trustees of the association, which had in fact no trustees :—

Held, that the plaintiffs were not entitled under Order XVI., r. 9, or otherwise, to maintain the action against the defendants as representative of the other members of the association, there being no ground for saying that the members of the association had the same interest in the action or the defence to it.

Decision of Fraser J. affirmed.

Duke of Bedford v. *Ellis* [1901] A. C. 1; *Markt & Co.* v. *Knight Steamship Co.* [1910] 2 K. B. 1021; *Walker* v. *Sur* [1914] 2 K. B. 930; *London Association for the Protection of Trade* v. *Greenlands* [1916] 2 A. C. 15; *Mercantile Marine Service Association* v. *Toms* [1916] 2 K. B. 243. Principles considered and applied.

A plaintiff cannot abandon his claim in tort and still pursue his claim for money had and received which depends upon the alleged tort.

Brocklebank, Ld. v. *The King* [1925] 1 K. B. 52 applied.

Sect. 4, sub-s. 1, of the Trade Disputes Act, 1906, applies to trade unions generally and is not limited or restricted in its application to trade unions of " workmen or masters," so as to exclude a trade union, such as the above mentioned association, whose object is " the imposing of restrictive conditions on the conduct of any trade or business " which was a " statutory object " under s. 1, sub-s. 2, of the Trade Union Act, 1913, and such a trade union, equally with trade unions of workmen or masters, is entitled to the immunity from actions of tort given by the section.

Vacher & Sons, Ld. v. *London Society of Compositors* [1913] A. C. 107 applied.

The naming twice over on the record of the same defendants to an action, first in their personal capacity, and secondly in a representative capacity, with the consequent appearance of two sets of counsel at the hearing, is altogether irregular.

APPEAL from two orders of Master Jelf.

The Motor Trade Association was an unregistered trade union the nature and constitution of which were set forth in its printed " Objects, Regulations and Bye-laws."

In that document the objects for which the Association was stated to be established, so far as relevant, were : " To encourage, promote and protect the motor industry in the United Kingdom and throughout the world, and generally to watch over and protect the interests of manufacturers,

wholesalers, retailers and users of motor goods and of others having commercial relationship with the motor industry."

The Regulations, so far as relevant, were as follow :—

3. The qualification of membership of the Association shall be that the proposed member is, in the opinion of the Council, eligible for membership, and engaged in the motor industry. . . . .

4. The Association shall be divided into the following classes : (1.) Manufacturers of, or sole concessionaires of, British motor vehicles. (2.) Manufacturers of, or sole concessionaires of, foreign motor vehicles. (3.) Manufacturers of, or sole concessionaires of, other motor goods. (4.) Factors, as appearing on Factors' List of the Society of Motor Manufacturers and Traders, Ld. (5.) Wholesale accessory dealers and manufacturers' agents. (6.) Insurance companies transacting motor business. (7.) Local representatives of members elected in classes 1, 2, 3, 4, 5 and 6. (8.) Contracting motor car agents. (9.) Engineer repairers and/or non-contracting dealers in motor cars. (10.) Motor car dealers. (11.) Accessory dealers (Retail). (12.) Persons, companies or firms who in the opinion of the Council are qualified under Regulation 3 for membership at a subscription less than that payable in class 9.

8. The business of the Association shall be controlled by a Council consisting of a President and sixty-six elected members (of whom sixteen shall be members in class 1, eight shall be members in class 2, nine shall be members in class 3, nine shall be members in classes 4 and 5, and twenty-four shall be members in classes 8, 9, 10 or 11 (of whom two shall be members in class 10), and not more than five co-opted members.) . . . .

9. The decisions of the Council expressed by resolution shall be binding on all members of the Association (and persons dealing with them subject to its rules and regulations), and shall not, except as otherwise provided by these regulations, be subject to review or rescission by general meeting, it being the intention that by the annual election of the Council the full power of conducting the affairs of the Association shall

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be vested in such Council until the next annual election, but nothing in this rule shall prevent the Council or President (or the Secretary acting on the requisition in writing of not less than twenty members) summoning a general meeting of the Association at any time. Minutes of a meeting of the Council entered in the minute book and signed by the chairman of such or any succeeding meeting shall be conclusive evidence of all resolutions of the Council.

10. The quorum for a general meeting of the Association shall be fifteen members personally present, and the quorum for a Council meeting shall be ten.

11. All members of the Council shall retire annually. In the case of a member whose membership is vacated by death, resignation, or other cause, the Council may elect a member to fill his place.

14. No member of the Motor Trade Association shall incur any liability beyond the payment of the annual subscription . . . . and none of the said members, officers, and servants shall be answerable for any act or default of any other of them or for joining in receipts for the sake of conformity, or for any loss, misfortune or damage which may happen in the execution of his office or in relation thereto, except the same shall happen by his own wilful act or default.

16. The funds of the Association shall be completely under the control of the Council, and it shall not be necessary in any case in which the Council so directs for the particulars of any specified payment to be entered or minuted. In such a case a minute that a sum be paid to a party therein named under this regulation shall be sufficient and conclusive evidence that it was properly so paid and applied within the objects of the Association, provided that no money shall at any time be applied for parliamentary or municipal electioneering purposes or connected with the holding of public offices.

The By-laws, so far as relevant, were as follow :—

1. On proof to the satisfaction of the Council that any company, association, firm, or person (all of whom are hereinafter referred to as " person ") has offered or advertised or

sold any proprietary price maintained article at a price above or below the price fixed by the manufacture, or concessionaire to which the Association has granted protection, the Council may place the name of such person on a list to be called the "stop list," and give notice thereof to all members of the Association or otherwise. This bye-law shall cover hire and hire-purchase transactions in accordance with regulations issued from time to time by the Council.

3. No member of the Association shall supply any motor goods to, or have any trade relations in regard to motor goods with any person whose name is on the stop list so long as the name of such person remains on the stop list. Provided that this Bye-law shall not prevent the supply of any motor goods, or any trade relations in regard to motor goods under any contract bona-fide entered into by and binding upon the member (and which he has no power to terminate), and which contract is existing at the time of the first publication of the name of such person on the stop list.

By-laws 4, 5, and 6 dealt with the powers of the Council in regard to the stop list.

On June 3, 1914, the Association obtained a certificate in the following terms: "Trade Union Act, 1913. Certificate under s. 2, sub-s. 3. I hereby certify that the Motor Trade Association is a trade-union within the meaning of the above Act. Given this 3rd day of June, 1914. (Sgd.) G. Stuart Robertson, Chief Registrar."

The plaintiffs, Messrs. Hardie & Lane, Ld., were agents for the sale of and dealers in motor cars, and in February, 1920, they became members of the Association.

On October 28, 1926, the plaintiffs brought the present action against the defendants, John Chiltern, Harry Arnold Bennett, and Percy Ingram Denyer, and the said John Chiltern, Harry Arnold Bennett, and Percy Ingram Denyer sued on their own behalf and on behalf of all other members of the Motor Trade Association.

On November 8, 1926, the defendants entered appearance in these words: "Take notice that appearance has been entered in this action for the defendants John Chiltern,

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Harry Ashley Bennett sued as Harry Arnold Bennett, and Percy Ingram Denyer, and the said John Chiltern, Harry Ashley Bennett sued as Harry Arnold Bennett and Percy Ingram Denyer on their own behalf and on behalf of all other members of the Motor Trade Association, but the said Percy Ingram Denyer denies that he is a member of or in any way liable to be sued on behalf of all the other members of the said Motor Trade Association."

On December 24, 1926, the plaintiffs delivered their statement of claim in which they stated (inter alia): (para. 1) that the defendants Chiltern, Bennett and Denyer substantially owned and controlled the business and undertaking of the Motor Trade Association and such business was in truth and in fact carried on for their profit and benefit; (para. 2) that further or alternatively the Association was an unregistered association of motor dealers and of motor manufacturers; that the defendants Chiltern, Bennett and Denyer were at all material times members of the said Association and also were members of a committee conducting the affairs of the Association on the members' behalf and were sued as representing the general body of the members; that the said defendants were at all material times the trustees of the Association and the funds of the Association were vested in them as such trustees; and that the said funds were at all material times the property of the members of the Association and vested in the said trustees upon trust for the members; (para. 3) that in or about February, 1920, the plaintiffs became members of the Association; that one of the bye-laws of the Association, bye-law 1, was as followed in the terms there set out; and that the plaintiffs would at the trial of the action crave leave to refer to the Objects, Regulations and Bye-laws of the Association as though the same were in the statement of claim fully set out; (para. 4) that in January, 1926, the defendants, Chiltern, Bennett and Denyer, acting in concert together and with one Neale, entered into a conspiracy in pursuance whereof they formed a scheme to obtain money fraudulently and by duress from the plaintiffs without any consideration; (para. 5) that on

or about January 25, 1926, the said Neale in pursuance of the said scheme visited the showrooms of the plaintiffs and falsely and fraudulently stated and represented to Captain Hardie, a director of the plaintiff company, that he (Neale) desired to purchase a 9/20 Rover four-seater motor car and, further in pursuance of the said scheme, made the following false and fraudulent representations to Captain Hardie (*a*) that he (Neale) had just sold his motor-cycle and could only just afford to pay the price of the car, (*b*) that he could not afford to pay the delivery charge or for the number-plates, (*c*) that he was an old customer; (para. 6) that thereupon and induced by the said misrepresentations Captain Hardie agreed to make no delivery charge and to include the price of the number-plates in the price of the said car; (para. 9) that relying on and induced by the misrepresentations of the defendants Captain Hardie, on behalf of the plaintiffs, orally agreed to pay the revenue tax for one year in respect of the said car, and to sell the same to the said Neale at the price of 225*l.*, the list price being 237*l.* 10*s.*; (para. 10) that on February 12, 1926, Neale in pursuance of the said scheme purported to buy the said motor car at the price of 225*l.*; (para. 11) that on March 3, 1926, the defendants in pursuance of the said scheme wrote to the plaintiffs a letter stating that facts had been brought to the notice of the Association with which their (plaintiffs') name was connected and would be brought before the stop list committee meeting at a specified time, and that the plaintiffs' attendance was invited; (para. 12) that in pursuance of the said request the two directors of the plaintiff company, namely, Captain Hardie and Captain Lane, attended the meeting of the said committee at which the defendant Denyer represented to them that the said motor car ought not to have been sold at a price less than 237*l.* 10*s.* and falsely and fraudulently represented to them that in consequence of its having been sold by the plaintiffs for 225*l.* the plaintiffs had committed a breach of the rules of the Association; (para. 13) that on March 18, 1926, the defendants in pursuance of the said scheme wrote a letter to the plaintiffs stating

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that the committee were prepared to recommend to the council that if they (the plaintiffs) would pay 200*l.* to their indemnity fund to mark their regret, sign and pay 7*l.* for the insertion of an enclosed undertaking in a journal called Motor Commerce which published a stop list for the defendants, and repurchase the said car, their doing so should be regarded as a satisfactory ending of the matter; (para. 16) that on March 24, 1926, Denyer in pursuance of the said scheme falsely and fraudulently represented to Captain Lane that in order that the plaintiffs' name should not appear on the defendants' stop list the defendants would require (*a*) repayment of the said 225*l.*, (*b*) payment of the said 7*l.*, (*c*) payment of the said 200*l.* in two instalments of 100*l.* each by way of fine, the first forthwith and the second within three months, and (*d*) a written indemnity by the plaintiffs that they would observe the protected prices of motor cars; (para. 17) that, induced and coerced by the aforesaid misrepresentations and duress, the plaintiffs on March 25, 1926, paid to the defendants 332*l.* and gave the required undertaking; (para. 18) that by reason of the premises the defendants impliedly agreed with the plaintiffs that the defendants would not print or cause to be printed or published any undertaking, or alternatively any undertaking other than that so given by the plaintiffs; (para. 19) that on March 27, 1926, the defendants wrongfully and in breach of the said implied agreement unlawfully caused to be printed and published in Motor Commerce the words of an undertaking which were set out; (para. 20) that the said words were not the words of the undertaking referred to in para. 17, and that the plaintiffs never agreed to the publication of the said words; (para. 25) that the plaintiffs were induced to and did do the aforesaid acts and things and pay the said sum of 332*l.* in consequence of the said scheme and induced by the defendants' fraud, conspiracy, and duress thereinbefore set out; (para. 26) that, alternatively, the defendants at all material times had and received the said sum of 332*l.* to the use of the plaintiffs; but that the plaintiffs were willing to give the defendants credit for the sum of 193*l.* 5*s.*

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being the value of the said motor car when the same was returned to the plaintiffs; (para. 27) that, further, on March 27, 1926, the defendants falsely and maliciously printed and published in Motor Commerce of the plaintiffs and of and concerning them in their business the words of the undertaking there published which were set out; (para. 29) that by the said words the defendants meant and were understood to mean that the plaintiffs had acted improperly and dishonestly and in breach of good faith, and that they were unworthy of trust and confidence; and that no one ought to have any dealings with them, and that they were unfit to carry on their said business; (para. 30) that by reason of the premises the plaintiffs had been injured in their said business and had been held up to hatred, ridicule, odium and contempt, and had otherwise suffered damage; and (para. 31) that by reason of the premises the plaintiffs had suffered damage, and claimed (A) damages, the particulars of special damage being (1.) the said sum of 332*l.*, (2.) the sum of 31*l.* 15*s.*, being the extent of depreciation in respect of the said "Rover" motor car, the plaintiffs having been compelled to accept its return in the circumstances aforesaid and it then being in fact a second-hand car; and, alternatively, as to the said sum of 332*l.*, (B.) the said sum of 332*l.* as and by way of money had and received by the defendants to the use of the plaintiffs.

By an order of Master Jelf dated April 4, 1927, and made on the application of the defendants, who were sued on their own behalf and on behalf of all other members of the Association, it was ordered "that the claim against the defendants in such representative capacity be dismissed and the statement of claim in so far as it seeks to make such claims be struck out on the grounds (1.) that in respect of such claims the statement of claim discloses no claim sustainable in law or any claim cognizable by this honourable Court; (2.) that the statement of claim discloses no matters giving ground for an action against the defendants as representatives of the Motor Trade Association or against the members thereof as represented by the defendants."

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By a second order of the said Master, of the same date, made on the application of the defendants Chiltern, Bennett, and Denyer, it was ordered "(*a*) that the writ and all subsequent proceedings in this action be amended by striking out from the title of this action the words 'and the said John Chiltern, Harry Arnold Bennett, Percy Ingram Denyer sued on their own behalf and on behalf of all other members of the Motor Trade Association.' (*b*) that the following portions of the statement of claim herein be struck out: (1.) In para. 1 the last sentence thereof, (2.) para. 2." (*c*) That the defendants should have further time for their defence.

When making these orders the Master made a note of the reasons for his decision in these terms: "Although I think that the argument of the plaintiffs is wrong, I do not think that it is 'unarguable' within the meaning of *Evans* v. *Barclays Bank* (1) (and the case there cited) in which the Court of Appeal decided that I should have let the action proceed. But I think that this case depends upon a different principle. Pleas in abatement having been abolished, I think that an application to strike out is the only appropriate remedy for the defendants. The Judicature Acts in abolishing pleas in abatement were only dealing with a matter of form and not of the rights of the parties: *Kendall* v. *Hamilton* (2); *Wilson Sons & Co.* v. *Balcarres Brook Steamship Co.* (3)"

The plaintiffs gave notices of appeal dated April 7, 1927, against these respective orders.

Sir Henry Slesser K.C. and *Simmons* for the plaintiffs. The Association here is an unregistered trade union with a certificate from the registrar. The action against the Association sounds in contract as well as in tort. But even if it only sounds in tort an action will lie against the Association through its trustees. The defendants say that this is unarguable and that the objection to the statement of claim is really a plea in abatement which though formally abolished still survives in substance, the remedy being to apply to have

(1) [1924] W. N. 97. (2) (1879) 4 App. Cas. 504.
(3) [1893] 1 Q. B. 422, 427.

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the statement of claim struck out. The Master acceded to the latter view, but stated in his note that the plaintiffs' claim was not unarguable having regard to *Evans* v. *Barclays Bank*. (1) He stated that this objection was in effect a plea in abatement and that the statement of claim must be struck out, seeing that the Judicature Acts in abolishing pleas of abatement were only dealing with a matter of form and not doing away with the rights of the parties.

If, as he the Master finds, the point is arguable, we rely on *Goodson* v. *Grierson* (2) as showing that the actions ought not to be summarily dismissed. On the question of abatement we rely on *Russian Commercial Bank* v. *Comptoir d'Escompte de Mulhouse* (3) An ordinary unincorporated society cannot be sued as such, but a trade union being created by statute can be sued either in contract or in tort: *Walker* v. *Sur* (4); *Mercantile Marine Service Association* v. *Toms*. (5)

Secondly, this action can sound in contract or in tort. There is both agreement and consideration and the consideration has failed. The action is in effect for money had and received and this question can be decided at the trial. There is certainly a constructive contract, and the matter is not wholly a "tortious act" within the meaning of the Trade Disputes Act, 1906, s. 4.

Thirdly, this Association is a union neither of masters nor of men. The Trade Disputes Act, 1906, s. 5, sub-s. 3, limits the term "trade dispute" to any dispute between employers and workmen or between workmen and workmen. This Association belongs to neither of these classes. It may be that unions for imposing trade restrictions are wrong in supposing that they are protected by the Act of 1906. At all events the point is one which the plaintiffs are entitled to raise at the trial. It is noticeable that by the Act of 1906, s. 5, "trade union" is to have the same meaning as in the Trades Union Acts, 1871 and 1876, but in s. 4 of the Act of 1906 that form of trade union which exists for the

(1) [1924] W. N. 97.
(2) [1908] 1 K. B. 761.
(3) [1925] A. C. 112.
(4) [1914] 2 K. B. 930.
(5) [1916] 2 K. B. 243.

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regulation of trade only, as in *Chamberlain's Wharf* v. *Smith* (1), is presumably excluded. The statute limits the meaning of the term to two classes of trade union to which the defendant Association does not belong.

Fourthly, the defendants are here sued as trustees of the union, and in this way an action in tort may be brought in certain circumstances even against a trade union. Before the Act of 1906 a trade union was liable in tort, according to the *Taff Vale Case* (2), and that liability was only taken away by the Act of 1906, s. 4. But by s. 4, sub-s. 2, the liability of trustees of a trade union to be sued in the events provided for by the Trade Union Act, 1871, s. 9, is preserved, except as to any "tortious act committed by or on behalf of the union" in contemplation or in furtherance of a trade dispute. The Act of 1871, which enabled trade unions to register, provided by s. 9 that the trustees might sue or be sued in cases concerning property of the union.

We rely on the dictum of Lord Haldane in *Vacher & Sons, Ld.* v. *London Society of Compositors* (3) showing that the liability of trustees as distinct from the union itself is preserved by the Act of 1906, s. 4, sub-s. 2, except as to torts committed in furtherance of a trade dispute. If that is correct, the trustees here are liable and through them the Association which they represent. This liability is not confined to registered trade unions, but "in the events provided for" applies to unregistered trade unions as here.

The case should proceed to trial in due course so that the question may be determined whether the Association as well as the individuals who constitute it are liable to return the money to the plaintiffs.

Giveen for the defendants, in their capacity as trustees. The Master's order was right. In the *Taff Vale Case* (2) the whole matter dealt with was interlocutory. In *Vacher & Sons, Ld.* v. *London Society of Compositors* (4) the Master had made an order striking out the name of the defendant

(1) [1900] 2 Ch. 605.
(2) [1901] A. C. 426.
(3) [1913] A. C. 107, 115.
(4) [1912] 1 K. B. 547.

society and Channell J. reversed this on the ground that the point should be decided at the trial of the action. On appeal the order of the Master was restored. In *Parr* v. *Lancashire and Cheshire Miners' Federation* (1) no interlocutory application was made. There is no indication that the defendants here are trustees within the Trade Union Act, 1871.

The action here is merely against individuals sued on behalf of others, and a writ of fi. fa. would not lie on a judgment against them. The *Taff Vale Case* (2) was a claim for an injunction, and there is no authority for the view that a money claim as distinct from an injunction had ever been maintained against an unincorporated society. As to the Trade Disputes Act, 1906, the Act was passed to alter the effect of the *Taff Vale Case*. (2) It followed that if the *Taff Vale Case* was in the plaintiffs' favour the Act itself was against their contention. The object of the Act was to prevent a trade union from being liable for the torts of the officials, and a "trade union" as defined by s. 5 of the Act includes associations for the regulation of trade. The Trade Union Act, 1871, s. 9, only applied to contract. The action in the present case sounds in tort. It is clear from *Brocklebank, Ld.* v. *The King* (3) that it is not possible to waive a tort and sue in contract, if the effect would be to enable an action to be brought which would otherwise not be maintainable.

H. St. John Field for the defendants in their personal capacity.

FRASER J. In this case the plaintiffs appeal from two orders of Master Jelf dated April 5, 1927. The plaintiffs are Hardie & Lane, Ld., and the defendants on the writ, which was issued on October 28, 1926, are John Chiltern, Harry Arnold Bennett, and Percy Ingram Denyer, and the said John Chiltern, Harry Arnold Bennett, and Percy Ingram Denyer sued on their own behalf and on behalf of all other members of the Motor Trade Association. The first order of Master Jelf was made on the application of Mr. Giveen

(1) [1913] 1 Ch. 366. (2) [1901] A. C. 426.
(3) [1925] 1 K. B. 52.

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on behalf of the defendants, who are sued on their own behalf and on behalf of all other members of the Motor Trade Association, and the Master's order was: "that the claim against the defendants in such representative capacity be dismissed and the statement of claim in so far as it seeks to make such claims be struck out on the grounds (1.) that in respect of such claims the statement of claim discloses no claim sustainable in law or any claim cognizable by this honourable Court; (2.) that the statement of claim discloses no matters giving ground for an action against the defendants as representatives of the Motor Trade Association or against the members thereof as represented by the defendants." The second order of Master Jelf was made on the application of Mr. St. John Field on behalf of the defendants John Chiltern, Harry Arnold Bennett, and Percy Ingram Denyer, and the Master's order dealt with amendments consequential on the view that he took on the first application. [His Lordship stated the facts at length, read the relevant provisions of the "Objects, Regulations, and Bye-laws" of the said Association, and of the statement of claim, and continued as follows:] In opening these appeals, counsel for the plaintiffs, Sir Henry Slesser, contended before me that the distinction between a case which was unarguable and one which depended on abatement is misconceived, that an unregistered union can be sued in a representative action, that this is an action which sounds in contract as well as in tort, that the plaintiffs were suing trustees and were entitled to proceed to trial even though the Association was unregistered, and that in order to succeed on these appeals it would be sufficient for him to prove that he has an arguable point within the meaning of the judgment of the Court of Appeal in *Evans* v. *Barclays Bank*. (1) In my opinion, however, there are two distinct and separate questions raised in these appeals, to which different considerations apply.

The Master made the order upon an application on behalf of the defendants sued on their own behalf and on behalf

(1) [1924] W. N. 97.

of all other members of the Motor Trade Association, and the order was that the claim against the defendants in such representative capacity be dismissed and the statement of claim in so far as it seeks to make such claim be struck out on the grounds (1.) that in respect of such claim the statement of claim discloses no claim sustainable in law, or any claim cognizable by this honourable Court; (2.) that the statement of claim discloses no matters giving ground for the action against the defendants as representatives of the Motor Trade Association or against the members thereof as represented by the defendants.

I proceed to deal with the second of these grounds first, that is, that the statement of claim discloses no matter giving ground for an action against the defendants as representatives of the Motor Trade Association or against the members thereof as represented by the defendants; in other words, that this is not a case to which Order XVI., r. 9, is applicable. That rule is as follows: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested." The words of the rule are: "having the same interest." As was pointed out by Lord Macnaghten in the case of *Duke of Bedford* v. *Ellis* (1) this rule was only meant to apply the practice of the Chancery Court to all Divisions of the High Court. "Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed

(1) [1901] A. C. 1, 8.

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to represent. To limit the rule to persons having a beneficial proprietary interest would be opposed to precedent, and not, I think, in accordance with common sense."

Then, later on, Lord Macnaghten referred to certain cases and said: "There are plenty of other cases which shew that, in order to justify a person suing in a representative character, it is quite enough that he has a common interest with those whom he claims to represent."

Of course, there it was the case of the plaintiffs being allowed to sue in a representative character which was being considered. See also the observations of Wills J. in *Wood* v. *McCarthy*. (1)

The essential condition of a representative action is that the persons who are to be represented have the same interests as the person representing them in one and the same cause or matter. In the words of Fletcher Moulton L.J. in the case of *Markt & Co.* v. *Knight Steamship Co.* and *Sale & Frazar* v. *Knight Steamship Co.* (2): "Representative actions are now regulated by Order XVI., r. 9. They originated in the Court of Chancery and were of common occurrence in that Court prior to the date of the Judicature Acts. There is no doubt that by Order XVI., r. 9, the procedure by representative action is extended to the Common Law side of the Supreme Court. But here a word of caution is necessary. In extending it the rule also formulates it. It may or may not accurately express the practice of the Court of Chancery at that date, but that is immaterial. It is the language of the rule that must govern us now, and even if it could be shewn that before the Judicature Act the Court of Chancery would have applied the procedure in cases not within the language of the rule, that would not affect the present practice in any branch of the Supreme Court. The rule defined what was in the future to be the practice of the Supreme Court, and it is to my mind immaterial whether on a consideration of the older decisions we are of opinion that in thus laying down the future practice it limited or enlarged or left unchanged the existing practice. We are

(1) [1893] 1 Q. B. 775, 778. (2) [1910] 2 K. B. 1021, 1038, 1039.

bound to take the rule as a statutory formulation of the practice and thus as a new point of departure." Then later on the learned Lord Justice said: "The essential condition of a representative action is that the persons who are to be represented have the same interests as the plaintiff in one and the same cause or matter." There, again, it was the case of a question of representation as regards the plaintiff. "There must therefore be a common interest alike in the sense that its subject and its relation to that subject must be the same." Then practically all the passage which I have read from Lord Macnaghten's speech was referred to by the learned Lord Justice, and he went on to say: "Whether we start from the language of the rule or from this authoritative interpretation of it, the present actions, even if the writs be amended as suggested, fail in every particular to answer the necessary condition of a representative action." I refer to these passages because I think they show the principles that I have to act upon in dealing with this matter. I may refer also to the observations of Vaughan Williams L.J. in the same case. The learned Lord Justice, after referring to the observations of Lord Macnaghten, said: "I must observe that the practice regarding representative actions was limited to the Court of Chancery, and was not adopted by the Common Law Courts. What we have to do is to construe the Rules under the Judicature Act which define the application of the practice as to representative actions for the Common Law Division and the Chancery Division alike, and which properly construed will, I suppose, govern the present practice, notwithstanding any prior practice in the Court of Chancery." (1) Buckley L.J. in the same case said: "Order XVI., r. 9, is a rule which allows one named person to sue as representing both himself and numerous other persons. The purpose and intention of r. 9 was to apply to all Divisions of the High Court the practice which had prevailed in the Court of Chancery when the parties were so numerous that you never could 'come at justice' if everybody interested was made a party." Then there is

(1) [1910] 2 K. B. 1028, 1029.

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a reference to Lord Macnaghten's observations in the case of *Duke of Bedford* v. *Ellis* (1) and to the *Taff Vale Case* (2) in 1901. Then the learned Lord Justice said: "*Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (2) was a case in which the matter arose in the form of the question whether an unincorporated society could be sued by its collective name." That, of course, was in 1901. "Lord Lindley there said: 'The rules as to parties to common law actions were too rigid for practical purposes when those rules had to be applied to such' (i.e. unincorporated) 'societies.' But the rules as to parties to suits in equity were not the same as those which governed Courts of common law, and were long since adapted to meet the difficulties presented by a multiplicity of persons interested in the subject-matter of litigation. Some of such persons were allowed to sue and be sued on behalf of themselves and all others having the same interest. This was done avowedly to prevent a failure of justice: see *Meux* v. *Maltby* (3) and the observations of the Master of the Rolls, Sir George Jessel, in *Commissioners of Sewers* v. *Gellatly*. (4) The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports." This is part of the observations of Lord Lindley which Buckley L.J. was quoting. "The principle is as applicable to new cases as to old and ought to be applied to the exigencies of modern life as occasion requires." (5)

The claims alleged in the statement of claim in the present action are claims for damages for the torts of conspiracy, fraud and libel, and claims dependent on what is in the nature of so-called quasi contract, money had and received by the defendants for the use of the plaintiffs without any consideration.

Before dealing with the further considerations by which I must be guided, having regard to the reported cases on Order XVI., r. 9, I ought to say that amongst the points at

(1) [1901] A. C. 1.
(2) [1901] A. C. 426.
(3) (1818) 2 Swans. 277.
(4) (1876) 3 Ch. D. 610, 615.
(5) [1910] 2 K. B. 1021, 1043, 1044.

first raised by Sir Henry Slesser for the plaintiffs was the contention that under s. 4, sub-s. 2, of the Trade Disputes Act, 1906, a trade union could be sued if its trustees could be joined. As to this Mr. Giveen replied that there was no sufficient indication that the defendants were trustees within the Trade Union Act, 1871, whereupon Sir Henry Slesser applied for leave to amend by alleging that the three named defendants were sued as trustees. I said, in view of the fact that the particulars which I have read had already been delivered, and delivered some time ago, and of the regulations of the Association to which I have referred to-day, and the further fact that this application was now made for the first time at this late stage of the proceedings, I should only allow the proposed amendment if it were supported by affidavit. Subsequently Sir Henry said that he would, in the circumstances, withdraw his application to amend and he stated his position in the following words: "I am not suing these parties as trustees. I do not contend that s. 4, sub-s. 2, of the Trade Disputes Act, 1916, can apply to this case, but I am suing them in a representative capacity and they are so described on the writ endorsement and statement of claim." In considering, as I have to do, whether this is a case which comes within Order XVI., r. 9, and in which if a representation order had been applied for I should have granted it, I attach importance to the fact that there are no trustees in whom the funds of the Association are vested. To quote the exact words of Sir Henry Slesser: "There is no claim against these parties as trustees." The learned counsel for the plaintiffs has definitely abandoned his contention that these defendants are trustees.

This case from some points of view bears a close resemblance to the case of *Walker* v. *Sur* (1) in the Court of Appeal. The head-note to that case is as follows: "In a common law action of debt for professional services rendered the plaintiff sued four named defendants 'on their own behalf and on behalf of all other members of' an unincorporated religious society, most of the members of which resided abroad. After

(1) [1914] 2 K. B. 930, 936.

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a defence had been delivered, the plaintiff, with a view to binding the society and its property, took out a summons under Order XVI., r. 9, asking that the writ and all subsequent proceedings be amended by describing the defendants as being 'sued on their own behalf and on behalf of all other members of' the society, and further asking that 'as the members of the said order are numerous and the above-named defendants are some of them, they be directed to defend the action on behalf of or for the benefit of all persons so interested, pursuant to Order XVI., r. 9.' The four defendants were not trustees of the society: *Held*, that the plaintiff was not entitled to a representation order under Order XVI., r. 9." It will be observed that in that case there were no funds vested in trustees and the observations of Kennedy L.J. seem to me to be very important in regard to the case that I now have to deal with, as indeed are the judgments of the other learned Lords Justices. I desire particularly to emphasize first of all the observations of Kennedy L.J., who said: "I wish that r. 9, so far as regards defendants, was clearer than it is, but I will confine myself to saying that this is an action of debt, and that such an action, where the person or persons sought to be sued are, as here, members of an unincorporated body which cannot itself be sued, will not lie, framed, as this action is sought to be, under the authority given by the learned judge. I admit that I feel a difficulty in saying what does, and in general terms what ought not to, fall within the terms of this permission; but of the body in the present case we know very little on the affidavits before us, and it is not pretended that, as was the case in the *Taff Vale Case* (1), there are any funds vested in trustees. It is not alleged that there are any such trustees at all, and the claim is to my mind a claim in which it is sought to make a judgment for payment of money effective against a number of persons who belong to a named society but who have no common fund vested in trustees who could be joined as representing the society." —I desire to point out the similarity of the facts there to this

(1) [1901] A. C. 426.

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extent, with the facts in this case that I am now dealing with.—" When I consider the nature of the money claim, I think the case becomes for this purpose reasonably clear, because day by day, if this is a large body, one member is going out and another is coming in. The body is continually changing, and to give a judgment against all the members for debt would be to include the case of an incoming member, who would be made liable though he was not a member at the date of the contract and in the case of an outgoing member you would have to take the state of things at the date of the judgment. A judgment could not very well be given against one who had ceased to be a member, and yet they are all supposed to be those persons who are said to be represented. If this order stands, they would, I suppose, be anybody who at the date—I do not know whether it would be at the date of the commencement of the action or of the judgment—is a member of the society." (1) That was what Kennedy L.J. said. I need not refer again to the particular passages in the Regulations of this Motor Trade Association, which I have already read. Vaughan Williams L.J. said (2): " In the particular case I think that the order was wrong, but, although I am of that opinion, I do not feel that I have thoroughly understood what the rule-makers meant by Order XVI., r. 9. This is an action for debt, and there is an allegation that money is due to the plaintiff for work done by him as an architect on behalf of an aggregate body of people who have no corporate existence and whom it would be practically impossible to sue individually." The Lord Justice then read the rule and said: " The rule, as it stands, does not purport to leave it to the mere will or choice of the plaintiff or of the defendants, nor to give a right in either case of selection at the choice of a plaintiff who wishes to sue representative members of an unincorporated society. As I understand the rule, it lies with the judge to give the authority, and if he thinks it a case in which the plaintiff may properly sue the persons that he proposes to sue as people proper to be authorised to defend in such cause or matter

(1) [1914] 2 K. B. 930, 936. (2) [1914] 2 K. B. 933, 935.

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on behalf of or for the benefit of all persons so interested, then the order may be made. That has not happened in the present case." Then later on he says: "I think it sufficient to say that I do not think that this particular action of debt against these four persons is within the provisions of Order XVI., r. 9." Buckley L.J. said in the course of his judgment: "If this order had not been appealed, and the plaintiff had gone to trial and asked for judgment, what judgment could he have obtained? At the most an order against these four persons. . . . . But when he had obtained his judgment he could have had execution only against the share of these four persons in that property. There is nothing representative about that." Then the learned Lord Justice read the rule and said: "One or more may therefore be sued on behalf of all or may be authorised to defend on behalf of all. If all can effectually be sued, it would be strange if all could not effectually defend. Can the rule mean that while all may be sued by representatives they cannot defend unless the Court gives authority so to do? However this may be, this plaintiff has intituled this writ as between himself as plaintiff and the four persons sued on their own behalf and on behalf of all other private members of the Brotherhood of St. John of God without showing that the defendants are representative parties such as that, if the plaintiff joins them, they will be proper persons for the Court to adopt as qualified to defend on behalf of the absent parties. In my judgment that is wrong." I desire to emphasize the next passage in the learned Lord Justice's judgment, in view of the facts in this case. "The plaintiff has not asked for any declaration of right as between himself and all the members of a class, which, if affirmed in his favour, could be enforced against individual members of the class. He is only suing for money, for which he wants judgment against certain persons, and he wants by this order to be in a position to say that he is pursuing his remedy against persons who are not parties in the sense of being parties on the record. It is true that Mr. Lowenthal has disclaimed that if he got judgment in this action he could enforce it against a person who is not a party;

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but that is not the question for our determination. We have to determine whether this action ought to go on so as that execution could be maintained against all the persons represented. In my judgment that would be impossible. It is simply an action of debt against a large number of individuals and no judgment could be obtained which would be representative against all of them; there could only be a judgment individually against each of them. For these reasons I think that the order of the learned judge was wrong, and that the appeal must be allowed."

In the present case again there is no claim, as there was in one of the cases to which I have been referred (*Curle* v. *Lester* (1)), against trustees as defendants to recover from them a certain sum of money alleged to be owing to the plaintiff from the members of the association, which, in that case, was a registered and not as here an unregistered trade union. The Divisional Court there held that such a claim could be properly brought, having regard to the provisions of ss. 8 and 9 of the Trade Union Act, 1871.

In *Parr* v. *Lancashire and Cheshire Miners' Federation* (2) the plaintiff sued the defendant federation for certain declarations and injunctions. There is no such claim as that here. Neville J. there said (3): "Lastly, it is said that the Miners' Federation, which is an unregistered association and certainly one of a somewhat amorphous character, is not properly sued and is not sufficiently represented here by the officials who have been made defendants. I think the rule is well expressed by Lord Macnaghten in the case of *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (4), where he says that an unregistered trade union 'may be sued in a representative action if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body.' It appears to me here that the chief officials of the Miners' Federation who have been made defendants do fairly represent that body. I have not the least doubt from the arguments that have been addressed

(1) (1893) 9 Times L. R. 480.
(2) [1913] 1 Ch. 366.
(3) [1913] 1 Ch. 375.
(4) [1901] A. C. 426.

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to me that the defendants who have been joined are acting on behalf of that association in the defences that they have raised here. It is said that the executive committee and the trustees were the proper defendants. What is wanted is a sufficient representation, and if the executive committee or if the trustees had desired to be added as defendants to this action, there is no question that upon application they could have been added as defendants, and that they were through their officers perfectly well advised of the case and put in a position in which they might have made such an application had they so wished, I feel no doubt whatever. I think therefore, that objection also fails." I desire to emphasize that that was the case of a claim for a declaration as to the rights of parties and for an injunction, and not a case such as is now before me of an action containing counts for a variety of alleged torts and a money count, which is a case of a wholly different kind.

I think I ought to refer to the case of the *Ideal Films, Ld.* v. *Richards* (1), where: "The plaintiffs brought an action of contract against certain members of an unregistered association, who were sued as representing the general body of members, and against the trustees of the property of the association. The plaintiffs by their statement of claim asked (inter alia) for an order directing the trustees to pay the sum claimed and the costs of the action out of the property of the association." It was held by the Court of Appeal that the plaintiffs were entitled in a representative action to insert this particular form of claim against the trustees, and in giving judgment Bankes L.J. said that "in view of the decision of the Court of Appeal in *Walker* v. *Sur* (2) the present claim in its revised form had been correctly drawn for the purposes of a claim against representative members of an unincorporated society." Then Scrutton L.J. said he did not wish to lay down any general principle, but it appeared to him that it would in some cases be convenient to join persons who were alleged to be trustees, as parties, to the original action, so that they might be present at the

(1) (1926) 14 Times L. R. 7, 8. (2) [1914] 2 K. B. 930.

trial, when the question will arise whether a declaration of liability should be made against them. In that particular case he could see no difficulty in the trustees remaining as defendants to the action. If one looks at the statement of claim in that case one sees first of all the allegation of the funds being vested in these trustees, and one sees that a declaration is asked for; and the action was against the trustees. In the present action not only are there no trustees sued, but there is no claim for any declaration for the purpose of the ascertainment of rights. Further, the actual wrongdoers in this case are before the Court.

As to the claims for damages for tort, the observations of Swinfen Eady and Pickford L.JJ. in the case of the *Mercantile Marine Service Association* v. *Toms* (1) are peculiarly in point. That was an action for libel and the dicta of Lord Macnaghten in the *Taff Vale Case* (2), which have been relied upon by the learned counsel for the plaintiffs in this case, were referred to by Swinfen Eady L.J. This is, of course, a very important case for me to consider in this action. The head-note says: "The plaintiffs brought an action for an alleged libel published in a journal owned and managed by the Imperial Merchant Service Guild. The guild was an unincorporated body having for its objects the protection of the interests and the legal defence of captains, officers, and apprentices of the merchant service. It consisted of about 15,000 members, and its business and affairs were conducted under the control and supervision of a management committee, of which the chairman, vice-chairman, and secretary were members. The plaintiffs issued the writ in the action against the chairman, vice-chairman, and secretary of the guild 'sued on their own behalf and on the behalf of all other members of' the guild, and applied for an order under Order XVI., r. 9, that the defendants should be appointed to represent all other members of the guild. *Held*, that the order ought not to be made." Swinfen Eady L.J. in the course of his judgment said: "I have great difficulty in seeing that in this case there are numerous

(1) [1916] 2 K. B. 243, 246, 248. (2) [1901] A. C. 426.

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persons having the same interest in this cause or matter within the meaning of the rule. The action is for libel, and the plaintiffs must prove who published the libel, and prima facie only those who have published it either by themselves or by their servants or agents or have authorised its publication are liable. The various members of this association may be in a wholly different position. If the members of the management committee were sued, and if in fact they had authorized the publication of the libel, they could raise such defence as might be open to them. It might be that their defence would be that the words complained of were not capable of the meaning alleged or of any defamatory meaning, or that the words did not refer to the plaintiffs. The other members of the association, if sued, might say that, however defamatory the words complained of might be, they did not authorize their publication; that they were on the high seas and knew nothing about the matter. In my opinion this rule is not intended to apply to such a case as this. I think that the observation of Lindley L.J. in *Temperton* v. *Russell* (1) is applicable to this case, where he says—I am paraphrasing it to make it applicable to the present case—that the persons assumed to be represented by these three officers, the chairman, vice-chairman, and secretary, have no such interest as is contemplated by the rule. I asked during the course of the argument whether there is any authority in the case of an action of tort, because this is pure tort, for the application of this rule, and no case has been referred to, and so far as I know there is no case in the books in which it has been done." Then later on the learned Lord Justice said: "In *Wood* v. *McCarthy* (2) Wills J. was of opinion that Order XVI., r. 9, did not apply to actions of tort, and I am not aware that the rule has ever been applied in cases of the kind, and one can see many reasons why it should not be so applied. The judgments of Buckley and of Kennedy L.JJ. in *Walker* v. *Sur* (3) illustrate this. There are, no doubt, dicta in the *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (4),

(1) [1893] 1 Q. B. 435, 438.
(2) [1893] 1 Q. B. 775.
(3) [1914] 2 K. B. 930.
(4) [1901] A. C. 426.

especially in the speech of Lord Macnaghten, which indicate that in a proper case it is possible that an order of that kind may be made; but I am quite satisfied that the present case is not one of those cases, and no order ought to be made here." Pickford L.J. said: "I am of the same opinion. We start with the fact that no such order has ever been known to be made. It does not, however, follow that the order cannot be made, but at any rate it suggests doubts as to whether it ought to be made. It is sought in an action of libel to make defendants by representation some 15,000 members of an unincorporated association." Then the learned Lord Justice went on to point out that no reason had been given by the plaintiffs why they should not be able to try their right with the action as at present constituted or possibly with the addition of the trustees.

In the case of the *London Association for Protection of Trade* v. *Greenlands, Ld.* (1), in the House of Lords, where an action of libel had been brought against two named individuals, and also against the London Association for the Protection of Trade, which was an unincorporated body comprising over 6000 members, Lord Parker of Waddington, after stating that the plaintiffs were wrong in making the Association a defendant in the action, said: "The London Association for the Protection of Trade is not a corporate body, nor is it a partnership, nor again is it a creation of statute. The plaintiffs were wrong in making it a defendant to the action. It appears, however, that the officials of the Association were not anxious to raise what might be considered a technical point, and an appearance was therefore entered by Sir Samuel Scott, an official and member, on behalf of himself and all other members of the Association. This, too, was wrong. Sir Samuel Scott could not properly defend on behalf of himself and all other members of the Association without an order of the Court authorizing him so to do. It may be said that this, too, was a technical matter. In my opinion, however, it was a matter of substance. Had Sir Samuel Scott applied to the Court for leave to defend on behalf of

(1) [1916] 2 A. C. 15, 38.

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himself and all other members of the Association, the Court would have had to inquire whether the case was within Order XVI., r. 9, of the Rules of the Supreme Court; in other words, whether the members of the association have a common interest within the meaning of that rule." The next few passages I desire to say that I regard as very important in the case I am now trying. "Upon such an inquiry the nature and constitution of the Association would have been of great materiality." Then lower down he says: "To use the words of the 8th edition of Lindley on Partnership, p. 14, 'if liabilities are to be fastened on' any members of such an Association 'it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association.' In view of such cases it would be going very far to hold that every member was liable for the tort of the secretary, even though such tort were committed in the course of carrying out the duties assigned to him under the contract between him and the persons who engaged him. In other words, there might be separate defences open to some members of the Association and not to others, and if this were so there would be no common interest within the rule. . . . . Lastly, if an order could have been made at all it must have been confined to authorizing Sir Samuel Scott to defend on behalf of himself and those who were members of the Association at the date of the alleged libel. Those who had become members since that date could not be liable at all. My Lords, it is obvious that these difficulties were questions of substance, and not mere technical matters which could be waived if the parties so elected."

In the present action I understood counsel on both sides to say, as indeed appears obvious, that the number of members of the trade association is considerable. It is to be observed that the observations of Buckley and Kennedy L.JJ. in *Walker* v. *Sur* (1), which I have already quoted, as to the difficulties in regard to the form of judgment and execution

(1) [1914] 2 K. B. 930.

in the case of a money claim, apply with equal force to the claims for damages for tort. I think in regard to this claim for money had and received to the use of the plaintiffs, remembering, as I do, that the action against the defendants personally will proceed to trial, it is sufficient for me here to emphasize the way in which the claim of contract is alleged in the particular paragraphs of the statement of claim dealing with it, the facts in connection with the constitution of the Association, the applicability to this claim of the judgments in *Walker* v. *Sur* (1), and finally my opinion that there is here no common interest as required by the rule.

I have now dealt with the alleged causes of action. I am quite satisfied that on the particular facts which I have to deal with here, this is not a case which comes within the provisions of Order XVI., r. 9.

In these circumstances it is unnecessary for me to deal with the further points raised on behalf of the defendants. Both appeals are dismissed and there will be the same order in each case; defendants' costs in any event.

Appeals dismissed.

J. R.

The plaintiffs appealed. The appeal was heard on June 21, 22 and 23, 1927.

Sir Henry Slesser K.C. and *Harold Simmons* for the appellants. Under Order XVI., rr. 6 and 7, the three individual defendants are properly joined as representing the Association. They have all entered an appearance personally, and only one has taken an objection to entering an appearance on behalf of the Association, which is a trade union holding a certificate under the Act of 1913 and possessing statutory privileges and incurring statutory liabilities.

We admit that a body which is not an entity cannot be sued in this form: *Walker* v. *Sur* (1); but there are passages in the judgment of Farwell J. and in the speeches of Lords Macnaghten and Lindley in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (2), which show that an

(1) [1914] 2 K. B. 930. (2) [1901] A. C. 426, 430, 436, 443.

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unregistered trade union is in the same position as a registered trade union in a question of tort and can be sued in a representative action; and that in a properly constituted case there can be an action against proper persons representative of a trade union, and an injunction and damages obtained. There must be proper parties chosen to represent the trade union: *Walker* v. *Sur* (1); *Mercantile Marine Service Association* v. *Toms* (2); but these persons have themselves invited us to bring this action, and they have raised a counterclaim. It is not necessary to add the trustees: *Parr.* v. *Lancashire and Cheshire Miners' Federation.* (3) Sect. 9 of the Trade Union Act, 1871, provides for actions against the trustees in respect of the union's property, but that does not apply to an unregistered union, and under the constitution of this Association the council have control of the funds and, if necessary, the persons who hold the funds as trustees for the council could be added as defendants.

Part of this action lies admittedly in tort, and it is said that s. 4, sub-s. 1, of the Trade Disputes Act, 1906, prohibits actions of tort. But that sub-section is not an absolute prohibition against all actions of tort. This is an association for restricting prices which comes within the amended definition in s. 16 of the Amendment Act, 1876: *Chamberlain's Wharf* v. *Smith* (4), but s. 4, sub-s. 1, of the Act of 1906 is limited to trade unions "whether of workmen or masters" which are words of limitation not referring to or covering the restrictive object of an association like this. In *Ware & De Freville, Ld.* v. *Motor Trade Association* (5), an action against this very trade union, the plaintiffs failed on the merits; but this point under s. 4, sub-s. 1, was never taken by them. That case was approved in *Sorrell* v. *Smith.* (6)

We submit that we should succeed on contract even if we do not succeed in tort, or if we waive the claim for libel.

Sir John Simon K.C. and *Giveen* for the respondents in their representative capacity. It is not open to the appellants

(1) [1914] 2 K. B. 930.
(2) [1916] 2 K. B. 243.
(3) [1913] 1 Ch. 366.
(4) [1900] 2 Ch. 605, 612.
(5) [1921] 3 K. B. 40.
(6) [1925] A. C. 700.

to waive their action in tort and proceed on contract: *Brocklebank, Ld.* v. *The King.* (1) The only element of contract is in the implied contract to repay on the part of the man who has extorted money by duress. They have to allege the tort in order to plead the contract. Sect. 4 of the Act of 1906 is an answer to both.

The contention on the meaning of s. 4, sub-s. 1, of the Act of 1906 is novel. "Whether of workmen or masters" is a phrase intended to be of a comprehensive, and not of a limited, character. The term "trade union" is defined by reference to the purposes for which it is formed. The definition of a trade union is to be found in s. 16 of the Act of 1876 and s. 2, sub-s. 1, of the Act of 1913, and there is nothing in s. 4, sub-s. 1, of the Act of 1906 to show that it is only applicable to one particular species of the genus. It is general in its application: *Vacher & Sons, Ld.* v. *London Society of Compositors.* (2)

Under Order XVI., r. 9, it is a condition precedent to a representation order that the numerous persons shall have "the same interest in one cause or matter." In the nature of things there can be no common interest in a libel action. This is quite a different thing, for here the plaintiffs pick out certain men and say he sues them as representing the other members of the Association known and unknown. The meaning of those words was discussed in *Markt & Co.* v. *Knight Steamship Co.* (3); *Walker* v. *Sur* (4); per Lord Parker in *London Association for Protection of Trade* v. *Greenlands, Ld.* (5) The words of Lords Macnaghten and Lindley in the *Taff Vale Case* (6) are too wide for the present day, and moreover that was the case of a registered trade union. The council of the Association are the right people to be sued: *Brown* v. *Lewis.* (7)

St. John Field (*Merriman K.C.* with him) for the three defendants in their personal capacity.

Sir Henry Slesser K.C. in reply. I abandon my claim

(1) [1925] 1 K. B. 52.
(2) [1913] A. C. 107.
(3) [1910] 2 K. B. 1021.
(4) [1914] 2 K. B. 930.
(5) [1916] 2 A. C. 15, 38.
(6) [1901] A. C. 426.
(7) (1896) 12 Times L. R. 455.

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of libel against the Association and also against the three defendants as individuals; but I retain the claim for conspiracy against all the defendants.

The words of the Act of 1906 must be construed strictly, because they are in abrogation of the common law: *Larkin* v. *Long* (1); *Valentine* v. *Hyde* (2); and this Association is not a trade union of either workmen or masters, which comprise the only types of union covered by s. 4. *Vacher's* case (3) dealt solely with a workman's union, and this point was not taken in it.

This action is not based on assumpsit or any fictional contract to repay; there is a direct and express breach of contract here and *Brocklebank's* case (4) has no application. If the Court think it does apply, then I do not press my claim for money had and received.

On the question of procedure, I submit that this society is bound together by its rules, and one or more of its members can be authorized to defend even against their wish: *Wood* v. *McCarthy*. (5) The wrongful act was an act done within the objects of the Association: *Rex* v. *Denyer*. (6) If I have shown that there are actions of tort which can be brought against an association like this, then the question of individual liability becomes one of fact. Two members of the executive council have been joined on their own invitation; the council are the people responsible and are in effect the trustees.

Cur. adv. vult.

June 29. LORD HANWORTH M.R. The plaintiff company appeal against two orders made herein by Fraser J. dated May 11 whereby he confirmed two orders made by the Master on April 5. Those orders directed that the statement of claim against the defendants in their representative capacity be dismissed and so much of it be struck out as embodies such a claim on the grounds: (1.) that the statement of claim discloses no claim sustainable in law, or any claim

(1) [1915] A. C. 814.
(2) [1919] 2 Ch. 129, 153.
(3) [1913] A. C. 107.
(4) [1925] 1 K. B. 52.
(5) [1893] 1 Q. B. 775.
(6) [1926] 2 K. B. 258.

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cognizable by the Court against the Motor Trade Association; or against the defendants personally in their character as members of the Association; or (2.) against those defendants sued as representing the Association. Put in other words this last question is whether the defendants, who have taken out these summonses, can be sued in a representative capacity within Order XVI., r. 9, as being persons having the same interest in one cause or matter, and so proper parties to defend, for the benefit of all persons interested in such cause or matter. No order under the rule has been obtained authorizing these defendants to defend in a representative capacity. The statement of claim discloses three causes of action and prays for damages for (*a*) conspiracy, (*b*) libel, and (*c*) money had and received. In the course of his argument before this Court Sir Henry Slesser definitely decided to abandon all claim for libel, and if the action proceeds the statement of claim must be amended in due course, accordingly.

The third claim for money had and received depends upon whether the plaintiffs can abandon the tort declared upon in para. 4 of the statement of claim, which it is alleged formed the basis of the acts and things thereafter charged against the defendants, and led to the payment by the plaintiffs to the defendants of a sum of 100*l.*, and sue for this sum under an indebitatus count. For the reasons given in the judgment of the majority of the Court in the case of *Brocklebank, Ld.* v. *The King* (1), in my judgment the plaintiffs are not entitled so to vary their claim. On the facts alleged, the cause of action stands upon conspiracy and duress, and it is not, in my judgment, possible for the plaintiffs to dissociate their claim from those facts and rest it upon a money count only. As Bankes L.J. said in that case (2), "no contract was intended to be entered into and no contract can now be fictitiously set up and made the basis of a claim." Sir Henry Slesser said that if this view were taken, he would not adhere to this claim. In the result, therefore, the claim for conspiracy alone remains.

(1) [1925] 1 K. B. 52. (2) [1925] 1 K. B. 66.

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After carefully reading again the judgment of Fraser J. upon the question under Order XVI., r. 9, I find that he has dealt completely with the points to be considered. It is unnecessary to go over the same ground and I desire to associate myself with his reasoning.

I will add only a few words. By Regulation 14, no member of the Motor Trade Association incurs any liability beyond the payment of the annual subscription, and by later words, is expressly exempted from liability for the act or default of other members or the officers of the Association. The Association is a shifting body. Its members constantly vary: some come in and some leave it.

It appears to me that the words of Lord Parker in *London Association for Protection of Trade* v. *Greenlands, Ld.* (1) and those of Swinfen Eady L.J. in *Mercantile Marine Service Association* v. *Toms* (2) are cogent to show that in the present case there is no ground for saying that the members of the Association have the same interest in the action or the defence to it or come within the ambit of Order XVI., r. 9. On this question, therefore, for the reasons given by Fraser J., I think the appeals should be dismissed.

The earlier question raised by the defendants—namely, whether the statement of claim discloses any claim sustainable in law against the Motor Trade Association, has been fully argued both by Sir Henry Slesser and Sir John Simon and deserves consideration and determination. The action is for damages for conspiracy. By s. 4 of the Trade Disputes Act, 1906, "an action against a trade union, whether workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court." The words of the section appear to be clear and direct and to prevent the Courts from taking cognizance of any proceedings for tort against a trade union, or against its members or its officials. Indeed that construction has been placed upon them, and in *Vacher & Sons*,

(1) [1916] 2 A. C. 15, 39, 40. (2) [1916] 2 K. B. 243.

Ld. v. *London Society of Compositors* (1) it was determined by the House of Lords that an action which was begun against a trade union for damages for tort ought to be summarily dismissed, because the section prevents any Court from entertaining it. In the same case, it was held that the section is not limited to tortious acts committed in contemplation or furtherance of a trade dispute, but extends to all torts. It is to be read simpliciter and free from any ambiguity or embarrassment derived from a study of other sections: see per Lords Macnaghten and Moulton.

But Sir Henry Slesser has presented an ingenious argument to limit the effect of the section. He contends that the words "whether of workmen or masters" are words of limitation and confine the trade unions which are entitled to ask for the immunity which the section gives, to those which are formed of workmen or masters, and does not include such a one as the Motor Trade Association, whose object is "the imposing of restrictive conditions on the conduct of any trade or business." Such an object is a "statutory object" under s. 1, sub-s. 2, of the Trade Union Act, 1913, and the definition of "trade union" under s. 2 of that Act is that it "means any combination . . . . the principal objects of which are under its constitution statutory objects." That definition applies now to a trade union under the Act of 1906. Hence, unless the words above, relied on by Sir Henry Slesser, are effective to restrict the meaning of "trade union" under s. 4 of the Act of 1906, the Motor Trade Association is within it, and is entitled to the immunity from actions for tort given by the section.

In the plain meaning of the English used, I find great difficulty in construing the words "whether of workmen or masters" as words of limitation. They are embracing words. The test of a trade union, whether under s. 16 of the Act of 1876, or s. 2 of the Act of 1913, is its objects, not its personnel. Sect. 4 of the Act of 1906, was passed to remove the effect of the decision in the *Taff Vale Railway Case* (2):

(1) [1913] A. C. 107. (2) [1901] A. C. 426.

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see per Lord Macnaghten in *Vacher's* case (1), and it is not possible to find a reason for s. 4 having a meaning limited to certain trade unions, i.e., those of workmen or masters; although, ex majore cautela, it may have been considered wise to insert words which made it plain that trade unions of masters, not less than a trade union of workmen, were covered by the immunity which it provides. The attempt which had been made to give a restricted meaning only to the section was rejected by the House of Lords in *Vacher's* case. (1) The speeches of the Lords all indicate that the section was to receive the wide meaning that its words appear to carry.

There is indeed an exception from the wide effect of sub-s. 1 of s. 4, made by sub-s. 2 of the section—an exception leaving the trustees of a union liable to actions or suits touching or concerning property held by them. If an exception such as suggested was to be given from the ambit of the immunity granted by sub-s. 1, it would appear that sub-s. 2 should have contained it, for the purpose of that sub-section was to create an exception from sub-s. 1.

The distinction of the language used in s. 4, sub-ss. 1 and 2, is remarked upon by Farwell L.J. in *Vacher's* case (2) in the Court of Appeal. It may be noted that this same Motor Trade Association was the defendant in *Ware & De Freville, Ld.* v. *Motor Trade Association.* (3) The effect of s. 4 was there considered in relation to the Association "because they are a trade union" (4), although a final opinion was not expressed, and nowhere is any such distinction raised as suggested in the present case.

For these reasons, I reject the construction suggested and am of opinion that the appeals fail, and must both be dismissed with costs.

SARGANT L.J. I am of the same opinion. Notwithstanding the elaborate argument of Sir Henry Slesser I think that the reasoning of Fraser J. is unshaken, and that he could not have come to any other conclusion without disregarding

(1) [1913] A. C. 107, 119.
(2) [1912] 3 K. B. 560, 561.
(3) [1921] 3 K. B. 40.
(4) Ibid. 74.

the plain practice of the Court as to representative actions and casting wholly unwarranted liabilities on a great number of persons who had done nothing to render themselves responsible and would have no proper opportunity of defending themselves. The action here is not to enforce a right against a fund in which all the members of the Motor Trade Association have a common interest, or to declare the interpretation of regulations binding them in common, a class of cases to which Order XVI., r. 9, is at any rate primarily applicable. It is to enforce a strictly personal liability against the named defendants and the whole of the members of the Association. Whether the liability so sought to be imposed is in contract, as in *Walker* v. *Sur* (1), or in tort, as in *Mercantile Marine Service Association* v. *Toms* (2), and the present case, the judgments of this Court in both these reported cases show decisively how impossible it is that the named defendants can adequately represent for the purposes of defence the different individual members of the Association, since these individuals may obviously have defences separate and distinct from those of the named defendants and of each other. And of all torts a tort based on conspiracy, the sole tort remaining in this case having regard to the attitude adopted by Sir Henry Slesser during the course of the appeal, would seem the least capable of being properly defended by two or three named defendants on behalf of the members of a large fluctuating unincorporated Association.

In my judgment, the two cases just cited, which of course are binding here, show clearly that an application by the plaintiffs to join the defendants or any of them in the proposed representative capacity would be unsuccessful; and this being so, the attempt to join them without leave must also fail.

I desire to add, though the matter is perhaps one of form rather than of substance, that it is incorrect to make any individual a defendant twice over because he happens to fill two capacities or has two different interests. The case often arises in actions in relation to trusts and the practice to the contrary is, in my experience, invariable.

(1) [1914] 2 K. B. 930. (2) [1916] 2 K. B. 243.

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The foregoing reasoning is sufficient to dispose of the appeals now before us, and it is not necessary for us, any more than it was for Fraser J., to deal with the question arising under the Trade Disputes Act, 1906. But as the point has been argued before us, I will express my concurrence with the view of my Lord that s. 4, sub-s. 1, of that Act applies to the present action and is a bar to it. In my opinion, s. 4, sub-s. 1, of that Act applies to all trade unions, and the words " whether of workmen or masters " are not words of limitation or restriction to two classes of trade unions out of four or more, but are intended to operate by way of comprehension or rather perhaps by way of negation of restriction.

LAWRENCE L.J. I agree. This action is unusually constituted in that the three defendants are named as parties twice over, first, without any statement as to the capacity in which they are sued, and secondly, with a statement that they are sued on their own behalf and on behalf of all other members of the Association. Two separate sets of counsel have been briefed for the three defendants, one set to represent them in their personal capacity and another set to represent them in their representative capacity. In my opinion, this double naming on the record and double representation by counsel is altogether irregular. There is no objection to combining in the same action claims against defendants who are sued in a representative capacity with claims against them personally, if such claims can be conveniently tried or disposed of together (see Order XVIII. of the Rules of the Supreme Court), and it is usual in such cases, in compliance with the requirements of Order III., r. 4, to state in the indorsement of claim on the writ that the defendants are sued in their personal capacity as well as in their representative capacity, but I know of no case in which the Court has permitted the same parties to be named twice over on the record or to be represented by two sets of counsel in Court. If the personal interests of the defendants conflict with the interests of the persons on whose behalf they are sued, they are obviously not the proper parties to represent such persons ;

whereas if their personal interests do not so conflict, there is no valid reason why they should be named twice over or why they should be represented by two sets of counsel. As, however, this objection is purely technical and could readily be dealt with by a formal amendment of the record it does not affect the substance of the matter.

Fraser J. has decided in favour of the defendants on the ground that the case does not come within the provisions of Order XVI., r. 9, because the members of the Association have no common interest within the meaning of that rule. Sir Henry Slesser, quite properly, placed great reliance on the weighty dicta of Lord Macnaghten and Lord Lindley in the *Taff Vale Case*. 1) Since that case was decided, however, there have been two cases in the Court of Appeal which are binding upon us—namely, *Sur's* case (2) and *Toms'* case. (3) The principles laid down in those two cases are, in my opinion, directly applicable here, and conclusively establish that in an action like the present the Court ought not to pronounce a judgment which would bind the absent members of the Association and make them liable for damages for conspiracy or for money had and received to the use of the plaintiffs. If any further authority were needed in support of this conclusion it is to be found in the speech of Lord Parker in *Greenland's* case (4), in the course of which that learned Law Lord gives cogent reasons why such an action as the present does not come within Order XVI., r. 9. I entirely agree with the decision of Fraser J. and with the reasons upon which that decision was based.

In my judgment, however, there is another fatal objection to the action in so far as it claims relief against the defendants as representing the members of the Association—namely, that it is an action which the Court is prohibited from entertaining by s. 4, sub-s. 1, of the Trade Disputes Act, 1906. Sir Henry Slesser contended that the prohibition contained in this section does not apply to the present action, because the Association is not a trade union of workmen or

(1) [1901] A. C. 426.
(2) [1914] 2 K. B. 930.
(3) [1916] 2 K. B. 243.
(4) [1916] 2 A. C. 15, 39.

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Lawrence L.J.

masters but is another type of trade union (namely, a combination to impose restrictive conditions on a trade), and further, that in any event the section does not apply to the claim for money had and received to the use of the plaintiffs. In my judgment, neither of these contentions is well founded. The section is, in my opinion, not confined to any particular type of trade union but extends to all trade unions falling within the definition contained in s. 2, sub-s. 1, of the Act of 1913. The words "whether of workmen or masters," in the collocation in which they are used, are obviously not intended to limit the expression "trade union" as suggested. Had that been the intention of the Legislature it is reasonable to assume that it would have been expressed in clear and unequivocal language. The phrase "whether of workmen or masters" is perhaps not very aptly chosen but, in my opinion, it is used comprehensively in order to emphasize the fact that the expression "trade union" in this section includes trade unions both of workmen and of masters. I agree that if construed in this way the reason for its insertion is perhaps not very obvious, but whatever may have been the real reason for such insertion, it does not, in my opinion, have the effect of excluding the other types of trade unions from the operation of the section.

As regards the claim for money had and received to the use of the plaintiffs, it appears clearly from the allegations in the statement of claim that it is founded upon the tortious acts alleged to have been committed by the defendants and, therefore, if sustainable at all, is a claim which falls directly within the section.

In the result, the two appeals fail on both grounds and must be dismissed with costs.

Appeals dismissed.

Solicitor for the appellants: *C. S. Tomlinson.*

Solicitors for the respondents: *Kenneth Brown, Baker, Baker.*

R. M.

[IN THE COURT OF APPEAL.]

C. A.
1927
Oct. 24.

EARL OF WESTMORLAND *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp Duty—"Conveyance or transfer operating as a voluntary disposition inter vivos"—Resettlement of real Estate—Overriding Power of Appointment—"Value of the property conveyed or transferred"—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 74, *sub-ss.* 1, 5.

By a disentailing assurance of August 27, 1914, the appellant, with the consent of the late Earl, disentailed a settled estate and capital moneys, limiting the same, subject to all estates prior to the estate tail, to such uses as he and the late Earl should appoint, and in default of and subject to any such appointment to the use of the appellant in fee simple. By a resettlement of August 28, 1914, made in pursuance of a family arrangement, the late Earl and the appellant, in exercise of the joint power given to them by the disentailing deed, as settlors, jointly and irrevocably appointed, and the appellant as settlor, granted and conveyed the settled estate and certain of the capital moneys to the trustees of the resettlement, subject to the life estate of the late Earl, to such uses upon such trusts and generally in such manner as the late Earl and the appellant should by deed, revocable or irrevocable, jointly appoint, and in default of and subject to any such appointment to the use of the appellant during his life, with remainder to the use of the appellant's first and every other son severally and successively according to seniority in tail male, with divers remainders over. It was agreed between the appellant and the Inland Revenue Commissioners that the net value in possession at the date of the resettlement of the settled estate and capital moneys was 45,000*l.*, and that the value of the property conveyed or transferred by the resettlement after deducting therefrom the value of the life interests of the late Earl and the appellant was 6600*l.* The Commissioners were of opinion that, notwithstanding the overriding joint power of appointment thereby reserved, the resettlement operated as a voluntary disposition inter vivos within the meaning of s. 74 of the Finance (1909–10) Act, 1910, and was subject to an ad valorem stamp of 66*l.* on the sum of 6600*l.* calculated as above mentioned. Rowlatt J. affirmed the decision of the Commissioners. On appeal:—

Held, that the Commissioners having found that the resettlement, notwithstanding the overriding power of appointment, conferred substantial benefits upon the persons taking under it within the meaning of sub-s. 5 of s. 74 of the Act of 1910, it fell within sub-s. 1 of that section as being a voluntary disposition inter vivos, and as such was chargeable with stamp duty on the value of the property conveyed, and not merely on the value of the interests of those persons who gave no consideration for the conveyance.

Held, therefore, that ad valorem stamp duty of 66*l.*, calculated on the basis adopted by the Commissioners, was payable on the resettlement.

Decision of Rowlatt J. affirmed.

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APPEAL from a decision of Rowlatt J. on a case stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891.

Immediately before the execution of the disentailing assurance and resettlement hereinafter mentioned the Sharlston estate and certain capital moneys stood limited under the will of Priscilla Dowager Countess of Westmorland to the use of the thirteenth Earl of Westmorland for life with remainder to the use of his eldest son Lord Burghersh, the appellant, in tail male, with divers remainders over.

By a disentailing assurance dated August 27, 1914, and made between the appellant of the first part the thirteenth Earl of the second part and Edmund Royds of the third part the appellant with the consent of the thirteenth Earl as protector of the settlement granted and disposed of the Sharlston estate and the capital moneys to Edmund Royds to hold to him and his heirs subject to the life estate of the thirteenth Earl and to all other estates and limitations (if any) having priority over the estate in tail male of the appellant but freed and discharged from the estate in tail male or in tail of the appellant To such uses upon such trusts and in such manner generally as the thirteenth Earl and the appellant should at any time or times by deed revocable or irrevocable or (as regards the capital moneys) by writing jointly appoint or direct And in default of and until and subject to any such appointment To the use of the appellant in fee simple.

By a resettlement dated August 28, 1914, the Sharlston estate and the balance (not exceeding 300*l.*) of the capital moneys were in pursuance of a family arrangement in that behalf and in consideration of divers other good causes and considerations the thirteenth Earl and the appellant in exercise of the joint power given to them by the disentailing assurance as settlors jointly and irrevocably appointed and the appellant according to his estate and interest therein as settlor granted and conveyed the Sharlston estate and the balance of the capital moneys to the trustees thereof to hold the same unto the trustees and their heirs subject to the

estate during the life of the thirteenth Earl and to all other estates and limitations (if any) having priority over the estate of the appellant under the said will To such uses upon such trusts and generally in such manner as the thirteenth Earl and the appellant should from time to time or at any time thereafter by deed revocable or irrevocable jointly appoint And in default of and until and subject to any such appointment To the use of the appellant during his life without impeachment of waste with remainder To the use of the appellant's first and every other son severally and successively according to seniority in tail male with divers remainders over.

The net value in possession at the date of the resettlement of the Sharlston estate and the balance of the capital moneys had been agreed between the appellant and the Inland Revenue Commissioners at 45,000*l.*

The Commissioners were of opinion that notwithstanding the overriding joint power of appointment thereby reserved, the resettlement operated as a voluntary disposition inter vivos within the meaning of s. 74 of the Finance (1909–10) Act, 1910 (1), and was subject to ad valorem stamp duty accordingly.

The Commissioners contended that the value of the property conveyed or transferred by the resettlement for the purposes of s. 74 was the sum of 45,000*l.* after deducting

(1) Finance (1909–10) Act, 1910, s. 74, sub-s. 1: "Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale. . . . ."

Sub-s. 5: "Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos, and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred."

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therefrom the value of the life interests at the date of the resettlement of the thirteenth Earl and the appellant. The value of the property conveyed or transferred calculated on that basis was computed at 6600*l.*, involving an ad valorem stamp of 66*l.* on the resettlement, at which figure they had assessed the duty.

The appellant, while admitting that the value of the reversionary interest so calculated, without taking into account the joint power of appointment reserved by the resettlement, was 6600*l.*, contended that the overriding power of appointment must be taken into account, and that if it were, the value of the property conveyed or transferred did not exceed 50*l.*, for which a 10*s.* ad valorem stamp was sufficient. The Commissioners admitted that the value did not exceed 50*l.* if the overriding power, by the exercise of which the reversionary interest was liable to be defeated or divested, were taken into account.

The appellant was dissatisfied with the assessment of the ad valorem duty at 66*l.*, and under s. 13 of the Stamp Act, 1891, required the Commissioners to state and sign this case, raising the questions (1.) whether the Commissioners were right in their opinion and contention, and whether the resettlement was liable to an ad valorem stamp duty of 66*l.*, and (2.) if not, to what duty it was liable.

Rowlatt J. held that the resettlement was liable to an ad valorem stamp duty of 66*l.*

The appellant appealed. The appeal was heard on October 24, 1927.

Luxmoore K.C. and *F. H. L. Errington* for the appellant.

Sir Douglas Hogg A.-G. and *J. H. Stamp* for the respondents were not called upon.

LORD HANWORTH M.R. This is an appeal from a decision of Rowlatt J. which was given in favour of the Crown as supporting a decision of the Commissioners of Inland Revenue, and the question which has to be determined is whether or not a deed dated August 28, 1914, has been properly assessed to stamp duty.

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The facts of the case are these: Priscilla, the Dowager Countess of Westmorland, made her will, which is dated June 28, 1867, and by which she conveyed the Sharlston estates in Yorkshire, valuable estates, to the twelfth Earl for his life and to the thirteenth Earl, at that time Lord Burghersh, for his life. The fourteenth Earl, who is now the present Earl and the appellant, was the first tenant in tail male under that will. Time passed on, and the position had come to be this, that there was to be a new family arrangement at a time when the present Earl's father, the thirteenth Earl, was tenant for life of these estates in Yorkshire and the fourteenth Earl was the tenant in tail male, and it was agreed to disentail the estates and to make a resettlement, and that was done by three deeds. There was first a disentailing assurance dated August 27, 1914; secondly, a deed dated August 28, whereby the rent-charges were provided for the appellant and his widow and issue during the life of his father, the late Earl; and thirdly, a resettlement also dated August 28, 1914, which was the deed whereby the present Earl's father, the thirteenth Earl, and the present Earl, the fourteenth Earl, resettled these estates. Before this latter deed of August 28, 1914, was executed there was already an existing joint power of appointment vested in the present Earl and his father; but the question that we have to determine is what is the stamp duty to which this deed of resettlement is subject. The effect of the deed may be put quite shortly. There is given to the thirteenth Earl a life interest, and there is a further life interest given to the then Lord Burghersh, the present fourteenth Earl, upon the falling in of his father's life interest, and there is also a power given to the father and the son irrevocably and jointly to make an appointment, and in default of and subject to any such appointment, then the estates are limited successively to the Westmorland family, the Fanes, and finally to the first and other sons of Augustus Fane severally and successively according to seniority in tail male with remainder to the use and the right heirs of Lord Burghersh.

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Now what is the stamp duty to which the resettlement is liable? Sect. 74, sub-s. 1, of the Finance Act (1909–10), 1910, provides that "Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale": in other words, although you may have a conveyance or transfer which operates as a voluntary disposition, still it is to be liable to stamp duty, but inasmuch as you cannot take a figure easily ascertained as the amount or value of the consideration for sale, you are to take what is the value of the property conveyed or transferred, and the voluntary conveyance is subject to stamp duty at that rate. The question what is meant by "any conveyance or transfer operating as a voluntary disposition inter vivos" is answered by sub-s. 5 of the same section, which in effect interprets the words that are used in sub-s. 1 and sweeps into the earlier part of the section everything which is not a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration, and all those conveyances or transfers are, for the purpose of s. 74, to be deemed to be conveyances and transfers operating as a voluntary disposition inter vivos. Thus you have clear words which operate upon this resettlement and bring into the ambit of s. 74, sub-s. 1, a conveyance such as this is, operating inter vivos, even though it is a voluntary disposition among the parties to it. Sub-s. 5 then goes on to provide that except in the case where upon such a conveyance marriage is a consideration "the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred." Thus the effect of this section cannot be avoided by putting in some small valuable consideration.

The only case where the consideration is to be deemed adequate is where there is a marriage, but you cannot get rid of the effect of sub-s. 5, because the question is entrusted to the Commissioners to determine the adequacy or inadequacy of the sum paid, and they have to consider also all other circumstances relating to the conveyance and whether or not it confers a substantial benefit on the person to whom the property is conveyed or transferred—not the source of the transfer from which that substantial benefit comes, but whether or not there is a substantial benefit conveyed to the person to whom the property is conveyed or transferred.

Looking at that "interpretation section" as I will call it, one goes back to consider what did this resettlement deed of August 28, 1914, do? It provided that the first life interest should be in the then Lord Westmorland, the second life interest in the then Lord Burghersh, that the two should have a joint power of appointment, and that there should be a reversion after that.

In this present case the Commissioners, in accordance with their duty, considered what was the purport and effect of this deed of resettlement, and they came to this conclusion —I will read para. 8—"The Commissioners were of opinion that notwithstanding the overriding joint power of appointment in the resettlement contained the resettlement conferred a substantial benefit on the persons who took interests thereunder after the death of the survivor of the late Earl and the appellant and that the resettlement operated as a voluntary disposition inter vivos within the meaning of s. 74." That being so, their decision, if based upon materials enabling them to so decide, has brought this conveyance back into sub-s. 1 as chargeable to stamp duty, and it then has to pay whatever is the stamp duty provided under sub-s. 1. The duties of the Commissioners are completed and exercised when they have determined, in accordance with sub-s. 5, what is the nature of the conveyance or transfer and whether it confers a substantial benefit on the persons to whom the property is conveyed; then their decision brings the

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conveyance within sub-s. 1 and the duty falls to be chargeable under the other sections of the Act.

It is said here that the decision of the Commissioners is ineffective—I do not say wrong, because of course if there were materials upon which they could exercise their discretion we could not interfere with it. What is said is this: There was no substantial benefit conferred upon the persons to whom the property was conveyed or transferred, because if you take the sum total of what the position was before August 28 and afterwards you will find that there is nothing more than a resettlement; that the present Earl of Westmorland was entitled to a life interest before and is entitled to a life interest afterwards; that he had a power of joint appointment before and he has a power of joint appointment now; and thus he has not had anything conferred upon him. The confusion, to my mind, in that argument is this, that what one has to consider is, not what is the sum total of the transaction, but what was the effect and purpose of the deed of August 28, which comes up for it to be decided whether it is liable to stamp duty and for what amount of stamp duty, and taking the deed as it stands, it is admitted by Mr. Luxmoore, and, I think, rightly admitted, that by that deed there was a fresh power of appointment made by it and granted to the late Earl and the present Earl. No doubt there was a power of appointment before, but it cannot be contended otherwise than that there was a fresh power of appointment given by this deed.

It is said that the benefit that is conferred is a very small one indeed, because you ought to deduct from the value of the property not merely the estimated value of the two life interests, but to take into account the possibility that under this power of appointment there will be appointed away the interests which would otherwise fall to the heirs of Westmorland. That seems to overlook the point which I think the Commissioners were entitled to consider—namely, whether or not this power of appointment itself was not something which conferred a substantial benefit on the person to whom it is given—and they have held that there is in that

power of appointment a substantial benefit conferred upon the present Earl of Westmorland. From the point of view of figures they have allowed the deduction of both life interests, but that leaves a sum of 6600*l.*, which is the subject-matter of the power of appointment, and to that extent and in respect of those figures the substantial benefit of making an appointment of it is conferred upon the present Earl.

The case of *Baker* v. *Inland Revenue Commissioners* (1) has been referred to, and it appears to me, following out the speech of Lord Cave, that he has stated what the effect of sub-s. 5 is when he says: "I think that means that a conveyance, although for value, comes within the section if it confers upon the grantee a substantial benefit beyond what that grantee gives, or (in other words) if it is in substance a gift to the person taking under it after allowing for any consideration which he brings in. In such cases the conveyance does confer a benefit—that is a gift—on the person to whom the conveyance is made, and to that extent is to be treated as a voluntary disposition." That being so, it appears to me that the Commissioners in this case had abundant materials upon which they could come to the conclusion they did, that they have come to a right conclusion, and therefore that the settlement must be stamped as indicated by them. Lord Finlay, referring to the powers of the Commissioners, said (2): "The Commissioners have devolved upon them the duty of forming an opinion whether 'by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred.'" They have to take into account all the circumstances and consider the matter; there was abundant material for them to do so. It appears to me that they have come to a right and proper conclusion, a conclusion which brings this settlement within sub-s. 1, and that it falls to be stamped at the value which they have estimated for it by virtue of the other sections. For

(1) [1924] A. C. 270, 275. (2) [1924] A. C. 284.

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these reasons I am of opinion that the judgment of Rowlatt J. was right, and that the appeal must be dismissed, but without costs, as the Attorney-General does not ask for them.

SARGANT L.J. I am of the same opinion. At the time when the settlement in question took effect the circumstances were that the late Earl, the thirteenth Earl, was tenant for life and the present Earl, the fourteenth Earl, was tenant in tail male in reversion; and the resettlement was effected substantially by two documents, because I leave out of consideration the intermediate document under which certain rent-charges were provided for the present Earl during the lifetime of his father, and the resettlement was in this form: It did not in any way touch the life interest of the late Earl; it was a resettlement effected by disentailing the reversionary estate in tail male of the fourteenth Earl, the present Earl, with the consent of the protector, his father, and by resettling the fee simple then acquired on the present Earl for life, with remainder in strict settlement. Further, as a conveyancing device for family purposes a not unusual provision was effected by the disentailing deed and by the new settlement —namely, that there was a joint power of appointment given to the late Earl and to the present Earl over the reversionary fee simple interest subject to the life estate of the thirteenth Earl.

In those circumstances the question arises as to what stamp duty is payable upon the document, and the only legislation we really have to consider is s. 74 of the Finance (1909–10) Act, 1910. By that section for the first time, I think, voluntary conveyances were charged with ad valorem stamp duty as if they were conveyances on sale, on the estimated value of property that was conveyed; and (as has been pointed out in the very similar case of *Baker* v. *Inland Revenue Commissioners* (1)) it was necessary, in view of that legislation, and unless the section was to be rendered to a great extent abortive, that provision should be made

(1) [1924] A. C. 270.

for settlements which were not entirely voluntary, but had some element of consideration in them. Accordingly, by sub-s. 5 of s. 74 it was provided in effect that except where marriage was the consideration the Commissioners of Inland Revenue should have the right of judging whether the considerations that did pass on the settlement were such as to prevent it being in effect, or to a large extent, a voluntary settlement. I do not read the whole of the section, which has been already incorporated in the judgment of Rowlatt J. and has been read out by my Lord, but the Commissioners might treat a settlement as voluntary, although there was some consideration for it if they were of opinion "that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred."

In this case the Commissioners have formed the opinion, under that sub-section, that this resettlement did confer substantial benefits upon the persons taking under it. That finding of the Commissioners has not been in any way impeached, and the result of it is that the settlement, although it may have been partly for good consideration, is brought under sub-s. 1 of s. 74 as being a conveyance or transfer operating as a voluntary disposition inter vivos, and so being chargeable with the like stamp duty as if it were a conveyance or transfer on sale with the substitution of the value of the property for the consideration on sale.

What is said by the appellant here is this: That although the settlement is to be treated as a voluntary settlement, yet that the stamp duty is to be imposed, not upon the property that was in fact conveyed, that is to say, the total value of the property, but on the interest that was given by the settlement to persons other than the present Earl—namely, to the sons or to the issue of the present Earl and the other persons taking under that settlement; and that inasmuch as there preceded the estates of those persons a joint power of appointment in the late Earl and in the present Earl, the market value of the interest so given to the issue

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of the present Earl and the other persons taking under the settlement was absolutely negligible, and the stamp duty ought therefore to be not more than, I think, 10*s*. Now in my judgment that is not so. It seems to me that under sub-s. 5 you have to consider merely whether the document in question is brought by sub-s. 5 within the operation of sub-s. 1, and if it is so brought within the operation of sub-s.1 then the stamp duty chargeable is the stamp duty on the value of the property conveyed, and not merely on the value of the interests of those persons who gave no consideration at all for that conveyance. It seems to me that the language of the section and of the sub-section is quite clear, and there would no doubt be extreme difficulty on the other view in proceeding to assess the value upon the beneficial interests of the various persons who did not give value on the occasion of the settlement. I think that the conclusion of the learned judge, and the reasons which he gave for that conclusion, are alike accurate, but I should like to point out the result on the alternative that is suggested by the appellant that the stamp duty ought to be assessed, not on the whole value of the property conferred, but on the interests of those beneficiaries who did not give value. If that is so, the true measure of that value I think would not be the market value if the market value is to be obtained from an outside purchaser on the assumption that the interests were put up for sale subject to their liability of being defeated under the joint power, for in such a case it might no doubt be probable that an outside purchaser might assume that the first thing that would be done would be to defeat his interest by virtue of the exercise of the joint power. In cases of this sort, where a settlement is made by father and son, and where a joint power is reserved to the father and son over the settled property, it seems to me that although technically the interests of the ultimate beneficiaries, subject to that joint power, are liable to be defeated by the exercise of the power, nevertheless they have in substance a very valuable though not quite indefeasible interest; and that those persons who concurred together in making a settlement for the purpose

of securing the property in the family, would be very unlikely to proceed by virtue of the exercise of the joint power to undo that which they had so carefully provided for. The joint power may be of very great use in managing the property, and for various purposes of that kind, but in considering what is the real value of the interest given to the persons who will succeed the present Earl, there really is little if any practical diminution in the value of the property by the circumstance that the late Earl and the present Earl reserved to themselves a joint power. I agree that the appeal should be dismissed.

LAWRENCE L.J. I agree. There is no appeal on the first point dealt with by the learned judge in the Court below—namely, whether the Commissioners were right in determining that the resettlement conferred a substantial benefit on the persons to whom the property was conveyed or transferred within the meaning of sub-s. 5 of s. 74.

The only question argued before this Court was as to the amount of the stamp duty payable on the footing that the resettlement is one which comes under sub-s. 1 of s. 74, which sub-section provides in substance that a voluntary conveyance shall be chargeable with stamp duty as if it were a conveyance for value, substituting the value of the property conveyed for the amount of the consideration.

The question, therefore, resolves itself into the simple point: What is the property conveyed or transferred within the meaning of that sub-section? Mr. Luxmoore contended that the property so conveyed or transferred consists of the estates and interests in the Sharlston estates taken by the beneficiaries under the resettlement other than the settlor and his father. In my opinion that contention is not well founded. It appears to me plain that the property conveyed or transferred consisted not of the interests taken by some of the beneficiaries under the resettlement in the Sharlston estates, but of the Sharlston estates themselves subject to the life interest of the settlor's father, and that accordingly the learned judge was right in holding that the stamp duty was assessable on the value of such last mentioned property. It

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is true that here, as in *Baker's* case (1), the Commissioners in assessing the duty have allowed a deduction in respect of the life interest conferred by the resettlement on the settlor, but in my opinion the making of that concession does not oblige the Commissioners to make a further concession in respect of the joint power of appointment conferred on the settlor and his father however logically such a further concession might appear to follow upon the concession already made. To hold otherwise would be to construe the subsection as enacting that the duty is to be assessed on the value of some of the benefits conferred by the resettlement and not according to its plain terms on the value of the property conveyed or transferred. I agree that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for appellant: *Royds, Rawstorne & Co.*
Solicitors for respondents: *Solicitor of Inland Revenue.*

(1) [1924] A. C. 270.

W. I. C.

[IN THE COURT OF APPEAL.]

C. A.
1927
Nov. 2, 3, 4, 25.

GOSSE MILLARD *v.* CANADIAN GOVERNMENT MERCHANT MARINE, LIMITED.

[1926. G. 238.]

Shipping—Bill of Lading—Delivery of Cargo in damaged Condition—Damage by Rain—Hatch-covers negligently left off during Repair to Vessel—"Act, neglect or default . . . . in the management of the ship"—Carriage of Goods by Sea Act, 1924 (14 & 15 *Geo.* 5, *c.* 22), *Sched., Art. III. r.* 2; *Art. IV., r.* 2 (*a*).

A steamship, with a cargo of tinplates on board carried under a bill of lading under the Carriage of Goods by Sea Act, 1924, sustained damage during the voyage which necessitated her being kept for some weeks in dock for repairs. While the repairs were being executed, workmen had frequently to be in and out of the hold where the tinplates were stored, and the hatches in consequence were often left open. Owing to the negligence of the shipowners' servants the hatches were not protected when rain was falling, and the rain having penetrated the hold damaged the tinplates. In an action by the owners of the tinplates in respect of the damage so caused:—

Held (Greer L.J. dissenting), that the negligence in the management of the hatches was "negligence in the management of the ship" within Art. IV., r. 2 (*a*), of the Schedule to the Carriage of Goods by Sea Act, 1924, and therefore by virtue of that article the shipowners were not liable for the damage.

Decision of Wright J. [1927] 2 K. B. 432 reversed on this point.

APPEAL from a decision of Wright J.

The plaintiffs claimed damages for breach of duty and/or contract in and about the carriage of tinplates on the defendants' steamship *Canadian Highlander*.

On February 4, 5 and 6, 1925, boxes of tinplates were shipped at Swansea by the plaintiffs on board the *Canadian Highlander*, under a bill of lading of which they were the holders, to be delivered by the defendants at Vancouver, British Columbia. Clause 18 of the bill of lading was in these terms: "The following are not to be deemed to be sufficiently packed: (*a*) Tinplates in boxes unless tin-lined and iron-hooped."

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On February 8 the ship arrived at Liverpool, and on February 9 certain lumber cargo was discharged. On February 10 the ship, in coming out of the dock, collided with the dockhead and sustained damage, which involved her being kept in dock for repairs until April 7, when she resumed her voyage. She arrived at Vancouver on May 17, and it was then found that the tinplates (packed in boxes, but the boxes were not tin lined and iron hooped), were rusty, stained and depreciated by contact with fresh water.

At the trial Wright J. found that the damage was caused by the tinplates being wetted by rain; that on February 9, while the lumber cargo was being discharged, some rain probably got into the hold where the tinplates were stored, and that more rain got in between February 10 and April 7, when the repairs were completed and the vessel resumed her voyage; and that the damage was owing to the hatches being negligently left unprotected from rain by the ship's officers and their deputies during the period when the repairs necessitated by the collision were being carried out. On these facts he held that the wetting of the tinplates thus caused by rain being allowed to get into the hold was not consistent with the performance by the defendants of the obligation imposed upon them by Art. III., r. 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, which provides that, "subject to the provisions of Article IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." He further held that the defendants were not entitled to rely on Art. IV., r. 2 (*a*), of the same Schedule, which provides that "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(*a*) act, neglect or default of the master, mariner, pilot, or the servants of the carrier . . . . in the management of the ship," inasmuch as in his opinion, applying the principle stated in *Rowson* v. *Atlantic Transport Co.* (1), those words only referred to matters affecting the ship as a ship—for instance, its safety, which might incidentally affect the cargo, such as the improper opening of sea

(1) [1903] 2 K. B. 666.

connections, so as to prejudice the ship's safety while also damaging the cargo.

With regard to clause 18 of the bill of lading upon which the defendants also relied as exempting them from liability in view of the fact that the tinplates were not packed in tin-lined and iron-hooped boxes, he held that as to the knowledge of every one the tinplates were not packed in boxes of that description, clause 18, if it received effect, would relieve the defendants from their statutory liability in respect of the actual goods they received for carriage, and was thus an infringement of Art. III., r. 8, and invalid.

He accordingly held that the various defences set up by the defendants failed, and he gave judgment for the plaintiffs.

The defendants appealed.

A. T. Miller K.C. and *Sir Robert Aske* for the appellants. While we do not now contest the finding of fact of Wright J. that the damage to the cargo was caused by rain getting into the hold where the tinplates were stowed, we submit that on that finding he came to a wrong conclusion in law. The rain did the damage while the hatch covers were left off to enable the repairs to be done which were rendered necessary by the collision. No doubt it was negligence on the part of those on board to leave off the covers, or not to have placed tarpaulins over the open hatchways while rain was falling, but that negligence was negligence "in the management of the ship" within Art. IV., r. 2 (*a*), of the Schedule to the Carriage of Goods by Sea Act, 1924, and for that negligence the appellants are not liable. What was being done in the nature of repairs was being done to the ship itself. Wright J. held that the respondents were entitled to recover by virtue of the obligation cast upon the appellants by Art. III., r. 2, of the Schedule to the Act of 1924—namely, to "properly and carefully load, handle, stow; carry, keep, care for, and discharge the goods carried." But that article does not impose an absolute obligation on the carrier; the article is prefixed by the words "subject to the provisions of Article IV." In this respect the Carriage of Goods by

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Sea Act, 1924, differs from the Harter Act. Art. IV. of the Act of 1924 is directed to a ship as a cargo carrying adventure, and says that if there has been negligence in the management of the ship no liability is imposed on the carrier for damage occurring in consequence of that negligence.

[GREER L.J. Was not the negligence in this case negligence in respect of the cargo ?]

No; it was negligence in the management of the ship. In *Carmichael* v. *Liverpool Sailing Shipowners' Association* (1) it was held that damage caused to cargo by water getting into the vessel owing to the negligent omission of the shipowners' servants to close an opening or port in the side of the vessel was damage arising from "improper navigation of the ship," although the ship was not hindered or impeded in her voyage. Lord Esher M.R. there said that the words "caused by improper navigation" did not refer simply to improper navigation with regard to the ship herself, but referred also to improper navigation with regard to the safety of the goods in the ship; that the words implied something wrongly done or wrongly omitted to be done by the shipowner or his servants. That decision, following *Good* v. *London Steamship Owners', &c., Association* (2), covers this case, where the damage was occasioned by the improper handling of the hatches. In *Canada Shipping Co.* v. *British Shipowners' Mutual Protecting Association* (3) it was held that damage to cargo due to its being stowed in the hold of a ship which had not been properly cleaned was not caused by improper navigation, but in the course of his judgment Charles J., referring to *Carmichael's* case (4), said that there "the partly closed opening rendered [the vessel] unsafe as a ship for the cargo just as she would have been unsafe had she gone to sea with her hatches open so that sea water could reach her hold." In *The Ferro* (5), where the words "management of the ship" are, apparently for the first time, collocated with the word "navigation," the decision was that bad stowage did not come within the

(1) (1887) 19 Q. B. D. 242, 247.
(2) (1871) L. R. 6 C. P. 563.
(3) (1889) 22 Q. B. D. 727, 731; affirmed (1889) 23 Q. B. D. 342.
(4) 19 Q. B. D. 242.
(5) [1893] P. 38.

words "management of the ship," but Sir Francis Jeune expressed the view that removal of the hatches for the sake of ventilation might be "management of the ship." In *The Glenochil* (1), a decision on the Harter Act, the facts were that during the discharge of cargo it became necessary to stiffen the ship. For this purpose the engineer ran water into the ballast tank, but negligently omitted to ascertain the condition of the sounding pipe and casing, which had, owing to the heavy weather, during the voyage become broken. It was held that damage caused by water thus reaching the cargo resulted from a fault in the "management" of the vessel. There the act was done merely for cargo purposes. Sir Francis Jeune said in that case that his illustration in *The Ferro* (2) of the removal of hatches for the sake of ventilation being "management of the ship," was not a happy one, but it is submitted that it was quite accurate. Barnes J. said again, as he had said before in *The Ferro* (2), that there were things to which the word "management" was applicable beyond those of navigation, and he proceeded to say that what was done in *The Glenochil* (1) was a fault "in the management of the vessel" in doing something necessary for the safety of the ship herself. That observation is precisely applicable to the present case. Again, in *The Rodney* (3), where the forecastle became flooded and the boatswain, while endeavouring with the aid of a poker to clear a pipe used to carry off the drainage, drove a hole through it, thereby admitting water into the forehold and damaging a portion of the cargo, it was held the shipowner was not liable, as the damage resulted from a fault in the management of the ship, the act having been done to render the forecastle habitable. There *The Glenochil* (1) was applied, and Barnes J. said that in his opinion the words "faults or errors in the management of the vessel" include improper handling of the ship as a ship which affects the safety of the cargo. The next case was *Rowson* v. *Atlantic Transport Co.* (4), upon which Wright J.

(1) [1896] P. 10.
(2) [1893] P. 38.
(3) [1900] P. 112.
(4) [1903] 2 K. B. 666.

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based his judgment that the leaving the hatch covers off did not constitute negligence "in the management of the ship," so far from being in the respondents' favour is against them, for there Vaughan Williams L.J. held that mismanagement of refrigerating apparatus might be mismanagement of the ship within the meaning of the Harter Act, if the apparatus could be considered part of the ship. In the Carriage of Goods by Sea Act, 1924, mismanagement of the ship is enough to exonerate the shipowners. Undue weight must not be given to decisions under the Harter Act. In *Hourani* v. *Harrison* (1) it was held by Bankes L.J. that "acts done . . . . in the course of discharge merely, cannot be held to come within the exception which is applied to acts which may affect the cargo, but which are acts done in the course of the management of the ship." *The Germanic* (2) and *The Newport News* (3) support this view.

Secondly, clause 18 of the bill of lading exempts the appellants from liability. The appellants accepted the cargo for carriage subject to the provision that if it was not properly packed they were not to be liable. The tinplates were not properly packed unless packed in tin-lined boxes, and they were not so packed.

[They referred to *Hordern & Sons* v. *Commonwealth and Dominion Line* (4); *Australasian United Steam Navigation Co.* v. *Hunt* (5); and *The Auditor*. (6)]

Jowitt K.C. and *G. St. C. Pilcher* for the respondents. On the main point we adopt as a guide for the construction of the words "act, neglect or default in the management of the ship" the judgment of Bankes L.J. in *Hourani* v. *Harrison* (7), where he said that the distinction is between want of care of the cargo and want of care of the vessel indirectly affecting the cargo. In the same judgment Bankes L.J. adopted the view expressed by Holmes J. in *The Germanic* (2) that the words exempt the shipowner from liability where the act

(1) (1927) 32 Com. Cas. 305, 316.
(2) (1905) 196 U. S. 589.
(3) (1912) 199 Fed. Rep. 968.
(4) [1917] 2 K. B. 420.
(5) [1921] 2 A. C. 351.
(6) (1924) 18 Ll. L. Rep. 464.
(7) 32 Com. Cas. 305.

done is primarily connected with the navigation or management of the vessel and not with the cargo. What were the facts found in this case? The judge has found that rain got into the cargo on February 9 and on some days between February 10 and April 7. On February 9 the only operation in progress was the discharge of the lumber cargo from the hold where the tinplates were stowed. Damage caused by rain allowed to get in during that operation cannot be said to have been caused by anything done "in the management of the ship." Again, as to the damage caused during the later period by rain getting into the hold, that may have been due to the carelessness of the repairers' men who are not within the exception, or the negligence of the crew in not putting back the tarpaulin when the rain commenced. That negligence was not negligence "in the management of the ship"; it was clearly negligence in connection with the cargo. The American cases—*The Jean Bart* (1); *The Jeanie* (2); *The Skipton Castle* (3); *The Carisbrook* (4); *Andean Trading Co.* v. *Pacific Steam Navigation Co.* (5); and *The Samland* (6)—on the construction of the Harter Act support the view we put forward. It is true that the framework of the Harter Act is different from that of the English Act of 1924, but it arrives at precisely the same result. With regard to *Rowson* v. *Atlantic Transport Co.* (7), the negligent act was negligent with regard to a part of the vessel qua vessel; therefore negligence in the management of that part was negligence "in the management of the ship." We do not quarrel with the other English cases cited for the appellants, although we do not accept all the reasoning by which the conclusion in them was arrived at. If the guides suggested by Bankes L.J. are kept in mind and applied each of these cases will be found to fall into its proper category.

On the second point, clause 18 of the bill of lading is inoperative, inasmuch as it seeks to lessen the responsibility of the shipowners. Moreover it was never suggested that

(1) (1911) 197 Fed. Rep. 1002.
(2) (1916) 236 Fed. Rep. 463.
(3) (1917) 243 Fed. Rep. 523.
(4) (1917) 247 Fed. Rep. 583.
(5) (1920) 263 Fed. Rep. 559.
(6) (1925) 7 Fed. Rep. (2nd Series) 155.
(7) [1903] 2 K. B. 666.

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there was anything wrong in shipping the tinplates packed in boxes which were not tin-lined.

A. T. Miller K.C. replied.

Cur. adv. vult.

Nov. 25. The following judgments were read :—

SCRUTTON L.J. This appeal raises an important question under the Carriage of Goods by Sea Act, 1924. Fortunately the facts raising it can be shortly stated. A large quantity of tinplates was shipped at Swansea in the defendants' steamship *Canadian Highlander* for carriage to Vancouver. They were shipped in good condition, but arrived in Vancouver seriously damaged by fresh water, of which, judging by the extent of the damage, a large quantity must have entered the hold in which they were stowed. At the trial two theories were put forward to explain this fresh water damage. The shipowners alleged that the water came from the unseasoned timber of the boxes in which the tinplates were packed. The judge was not satisfied of this, and found that the boxes were "good average normal boxes." The cargo owners alleged that the fresh water causing the damage was rain entering through the shelter deck and 'tweendeck hatches of hold No. 5, left open by negligence of the ship's officers and their deputies while it was raining. The judge accepts this view, and finds that while damage by collision in the stern was being examined cracks were found in the liner of the tail shaft, which had to be taken out and replaced. This involved the presence of a considerable number of surveyors and workmen in No. 5 lower hold, where the tinplates were stowed in the square of the hatch, and constant passing through the hatches of men and material. The judge finds that there was default of the ship's officers in leaving the hatches open so that rain entered. In fact it must have entered in considerable quantities to cause the very extensive damage; the judge finds that enough rain entered during this period of repair (during which, also, the crew were scaling and painting in No. 5 'tweendecks which they entered through the shelter deck hatch), to account for all the damage found.

He also finds that it is probable that some rain had entered earlier on a day when lumber was being discharged from the No. 5 'tweendeck. On that day the shelter deck hatch was open, and the judge finds that the lower deck hatch was not protected, as it should have been, by any tarpaulin. This appears to be a small matter; the rain entering during the period of repair when the 'tween or lower deck hatch was open being found sufficient to account for all the damage to the tinplates. No attempt was made, on the hearing of the appeal, to challenge these findings of fact.

The next question is: Do these facts bring the damage within any exception protecting the shipowners? These exceptions are to be found in the Carriage of Goods by Sea Act, 1924, and in the bill of lading if the bill of lading provisions do not weaken the protection given to the cargo owner by the Act. Art. III. of the Schedule to the Act describes the obligation of the shipowner to be "to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." This obligation replaces the previous obligation of a common carrier, and improves the position of the shipowner. This obligation, moreover, is subject to the provisions of Art. IV., which is also introduced by the provisions in Art. II. as to "rights and immunities." Exception (*a*) of Art. IV. reads as follows: "Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." While this partially follows the wording of the United States Harter Act of 1893, which reads, "Shall not be responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel," that wording was derived from earlier English bills of lading. It could not have come from United States bills of lading, for the United States Courts took the view that all negligence clauses in contracts of affreightment were void as contrary to public policy, a conclusion which the English Courts were not able to adopt.

The question, therefore, is whether the facts found by the judge amount to "neglect or default of the servants of the

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carrier in the management of the ship." Unassisted by authorities I should have felt no doubt that they did. Assuming that the words deal with the management of the ship as a physical entity, and not management of the cargo-carrying adventure on which the shipowner and cargo owner have agreed to use the ship, here what has been managed is the hatches of No. 5 hold, an essential physical part of the ship. For the purpose of repairing damage to the ship in order that she may resume her voyage, those hatches have been physically dealt with and dealt with so negligently that during their absence in rainy weather such quantities of rain have entered the hold as to damage the cargo in the hold. I cannot understand why, on the words themselves, without reference to any authorities, this is not negligence in the management of the ship, or a substantial physical part of the ship.

The words to be construed occur in a statutory contract between shipowner and cargo owner relating to the carriage of goods in a ship. The cargo owner has no interest in an empty ship or its management. The shipowner undertakes to use due diligence to provide a ship fit for the carriage of goods, including proper propelling and pumping machinery and, where the cargo requires it, proper refrigerating and ventilating appliances, and in such a proper ship properly to carry and deliver a cargo, and he exempts himself from liability for negligent management of such a ship by his servants. Why it should be an objection to management of part of the ship coming within the exception that it is being primarily managed for the benefit of the cargo, I do not understand. That is what the ship is to be used for. It is "navigated" to direct the ship and so carry the cargo safely to its proper destination. It is as a physical entity "managed" for the same purpose.

Some of the management may not preserve the physical ship, but it is still carried out to preserve the cargo. I cannot see any difference between negligently leaving partly open a port or seacock, whereby water enters which is no danger to the ship, but damages the cargo, negligently

managing the pumping apparatus with the same result, or negligently leaving the hatches off, whether to repair the ship or ventilate the cargo, whereby salt water at sea, or fresh water in rainy weather in port, enters the hold and damages the cargo. Negligent management of the propelling machinery, which is hardly "navigation," and negligent management of the refrigerating or ventilating or pumping machinery, seem all to be equally management of the ship. Most modern steamers have masts with no yards, but derricks for loading and unloading cargo attached to them. I do not understand why the derricks are not part of the ship.

But it is said that the authorities compel one to hold that a part of the ship primarily used for the benefit of the cargo, if negligently managed, does not come within the exception. It might be enough to say that these hatches were primarily taken off to enable the ship to be repaired and prosecute the contract voyage. But the contention is so important that it is well that the authorities which are supposed to lead to it should be considered.

The authorities fall into three classes: (1.) the decisions of the English Courts on bills of lading, (2.) the decisions on the Harter Act, 1893, either by the American Courts construing their own statute, or by the English Courts construing the words of the statute as incorporated in a bill of lading made in the United States, (3.) the decisions on the English Act of 1924.

(1.) The original wording of English bills was either "perils of navigation," "negligence in navigation," or "negligence in the course of the voyage." Questions arose under this wording whether negligence in the conduct of the ship while loading or discharging was covered. *Laurie* v. *Douglas* (1), where loss during discharge was held covered as a peril of navigation, may be compared with *The Accomac* (2), where the Court of Appeal held negligence in removing a bilge pipe during discharge not to be "navigation," though it might be in the course of the charterparty "voyage."

(1) (1846) 15 M. & W. 746. (2) (1890) 15 P. D. 208.

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This latter view was also taken by Sir James Hannen in *The Carron Park.* (1)

Probably to meet this difficulty the word "management" was added after "navigation." I have not found, and learned counsel could not refer us to, any case using the word "management" earlier than *The Ferro* (2) in 1893, but I think it had been used for some years before. The facts there were bad stowage of cargo by the stevedores, not involving any movement of parts of the ship. Sir Francis Jeune thought that such stowage was not management of the ship, but suggested that removal of the hatches for the purpose of ventilation would be. Barnes J. agreed that bad stowage was not management of the ship, words which he did not think "went much if at all beyond the word 'navigation.'"

Oddly enough, when, two years later, the same two judges considered the words of the Harter Act in *The Glenochil* (3), each slightly altered his view as expressed in *The Ferro.* (2) Sir Francis Jeune thought his illustration of removal of the hatches for ventilation was "not a happy one." I do not know why, as I should have thought it, like pumping the bilges, was a typical case of "management of the ship." The President made the distinction between "want of care of cargo" and "want of care of vessel indirectly affecting the cargo." I do not understand why want of care in dealing with the vessel or part of it should not be management of the vessel, whether it affects the cargo directly or indirectly, so long as a physical part of the vessel is affected or manipulated. Barnes J. held that "management" certainly added something to navigation, and applied it to the proper handling of the vessel for her own safety, and not primarily for the safety of the cargo, though done when the ship was not being navigated. Again, I do not understand why a negligent handling of part of the vessel should not be management of the ship, because it is primarily done for the protection of the cargo. Take failure to pump

(1) (1890) 15 P. D. 203. (2) [1893] P. 38.
(3) [1896] P. 10.

water out of a cargo hold, the water not being sufficient to affect the safety of the ship, but enough to damage the cargo. Why should not this be "management of the ship" in a contract which is concerned with safe carriage of cargo in a ship? Anyhow, in *The Glenochil* (1) negligently running water into a tank to stiffen the ship while discharging, without discovering a broken pipe through which the water ran into the cargo hold, was held "management of the ship." In *The Rodney* (2), also a Harter Act case, the boatswain, in clearing a drainage pipe, poked a hole in it, whereby water entered a cargo space, and this was held to be "management of the vessel." The President treats the words as covering "keeping the vessel in a proper condition," and Barnes J. defines them as "improper handling of the ship, as a ship, which affects the safety of the cargo." These definitions seem to me to cover the present case. The ship was being repaired—"kept in a proper condition"; to effect the repairs, a part of the ship, the hatch, was being handled, removed and replaced. This was done so negligently that, through the open hatch, rain entered the hold and damaged the cargo. The definition of Barnes J. was accepted by Stirling L.J. in *Rowson* v. *Atlantic Transport Co.* (3), a Harter Act case, and by Bankes and Atkin L.JJ. in *Hourani* v. *Harrison* (4), a case on the English Act.

Some of the trouble in the case arises from the decision of the Court of Appeal in *Rowson's* case. (3) Nowadays, many ships are built with insulated holds, the walls of which are thickly lined with charcoal. This does not refrigerate them, but, like a thermos flask, keeps a hot hold hot and a cold hold cold. Refrigeration is effected by very elaborate pipes and machinery sometimes built into the hold, sometimes connected with it, but as much a part of the ship as the propelling machinery, the pumping machinery, and the ventilating machinery. Indeed the English Act of 1924 speaks of all these refrigerating holds as "parts of the ship," to be made fit for the carriage of goods. As explained,

(1) [1896] P. 10.
(2) [1900] P. 112.
(3) [1903] 2 K. B. 666, 681.
(4) 32 Com. Cas. 305.

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no hold is refrigerating without elaborate machinery. In *Rowson's* case (1) the engineer mismanaged the refrigerating machinery, whereby the cargo was damaged. Kennedy J. held that this was mismanagement of the ship, of which the machinery was a part. I quite agree with him. The Court of Appeal, while affirming him, had doubts about the matter till they discovered that the refrigerating machinery which cooled the cargo of butter also cooled the ship's butter, which was then being carried in another insulated compartment, which might be used for either cargo or ship's provisions. Vaughan Williams L.J. used the phrase "management of the vessel qua vessel." I do not quite see how you can manage the vessel except as a vessel; and in a contract between shipowner and cargo owner the vessel is a cargo-carrying vessel, and the management of the vessel is the management of a cargo-carrying vessel—not an empty vessel. Some higher tribunal may feel strong enough to treat the words "management of the ship" as management of the cargo-carrying adventure carried on in the ship, which is the purpose of the contracting parties. I should welcome such a decision. This meaning would cover bad stowage, and the management of the crew and stevedores. But, without going as far as this, management of the ship must include management of parts of the ship, which incidentally damages some of the cargo, and if it is necessary that the management should be primarily intended to keep the ship fit, that condition is fulfilled when the management of part of the ship, the hatches, is for the purpose of repairing damage to the ship itself in the course of her contract voyage.

(2.) It is difficult to reconcile the decisions of the United States Courts with themselves or with the English decisions, and the Harter Act itself differs widely from the English Act. This arises partly from the fact that the United States Courts treated all negligence clauses in contracts of affreightment as contrary to public policy, and the Harter Act was therefore an allowance of clauses contrary to public policy, and as such to be restricted, while the English Courts allowed

(1) [1903] 2 K. B. 666, 681.

freedom of contract, and limited provisions which restricted that freedom. From this point of view ss. 1 and 2 of the Harter Act were treated as indicating the fundamental purpose of the Act, and as Holmes J. said in *The Germanic* (1), remove matters, which would otherwise be within the exceptions of s. 3, from its operation. The English Act, on the other hand, expressly makes the obligation of Arts. II. and III. subject to the immunities and exceptions of Art. IV. In *The Germanic* (1) a combined operation of loading coal for ship's use and discharging cargo was conducted so negligently that the ship lost her trim and capsized. This was held not "management of the ship." I should have thought it clearly was such management, just as provision of ballast would be. The United States Courts have held management of the ship not to include: insufficient covering of the hatches: *The Jeanie* (2); failure to open hatches to ventilate cargo: *The Jean Bart* (3); failure to close hatches during rough weather, which had been opened to ventilate cargo: *Andean Trading Co.* v. *Pacific Steam Navigation Co.* (4); negligent management of refrigerating machinery: *The Samland.* (5) I should have decided all these cases differently. They have held management of the ship to include: failure to pump water out of bilges, causing damage to cargo: *The Merida* (6) and other cases; mismanagement of seacocks whereby cargo is damaged: *American Sugar Refining Co.* v. *Rickinson* (7); failure to cover ventilators or sounding pipes or to close port holes: *The Hudson* (8); *The Newport News* (9); *The Carisbrook* (10); *The Silvia.* (11)

I refer to an excellent summary and discussion of the American cases in the third edition of Mr. Robert Temperley's work on the English Act, pp. 46–61. I appreciate the desirability of getting uniformity of decision in maritime cases, as pointed out by Atkin L.J. in *Hourani* v. *Harrison* (12),

(1) 196 U. S. 589.
(2) 236 Fed. Rep. 463.
(3) 197 Fed. Rep. 1002.
(4) 263 Fed. Rep. 559.
(5) 7 Fed. Rep. (2nd Series) 155.
(6) (1901) 107 Fed. Rep. 146.
(7) (1903) 124 Fed. Rep. 188.
(8) (1909) 172 Fed. Rep. 1005.
(9) 199 Fed. Rep. 968.
(10) 247 Fed. Rep. 583.
(11) (1898) 171 U. S. 462.
(12) 32 Com. Cas. 305, 318.

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though the cogency of these remarks is somewhat weakened by the learned Lord Justice's view in the same judgment, with which I agree, that negligence in managing machinery built into the ship for the purpose of protecting the cargo is probably "management of the ship." The United States Courts had decided the other way. But on this question of harmony of decisions I have always thought the words of Brett M.R. in *Svensden* v. *Wallace* (1) of great value. He says: "It was urged that even if the proposition is stated in terms larger than have hitherto been recognized in English law, yet it ought now to be adopted in order to bring the principle of English law on the subject into consonance with the laws of all other countries. But to this I cannot agree. It is useless to inquire whether the law is, as stated, the same in all European countries. For if it is, yet no English Court has any mission to adapt the law of England to the laws of other countries; it has authority only to declare what the law of England is. And even if we could do what is suggested, I should doubt the expediency of making the law of the greatest commercial and maritime country in the world bend to the law of other countries where commercial operations are far less extensive, and where commercial adventure is far more timid. As to the cognate law of America, it has been declared over and over again, that the English and American Courts have diverged upon this particular head of law, the law of general average. The question therefore must be, what is the law of England in this matter."

For reasons it is unnecessary to indicate, the United States of America have not been, except in some exceptional periods, a shipowning country, and they have approached shipping matters from the point of view of the cargo owners. I cannot think that their decisions, while treated with great respect, should necessarily control the shipping decisions of the Courts of the greatest shipowning country in the world.

(3.) There is only one relevant decision on the English Act. In *Hourani* v. *Harrison* (2) this Court decided that thefts by stevedores in Mexico, which the officers apparently

(1) (1884) 13 Q. B. D. 69, 72. (2) 32 Com. Cas. 305.

could not stop, were not defaults in the management of the ship. They accepted Barnes J.'s definition in *The Rodney* (1), but confined the exception to management of the ship, and declined to include in it management of the business of the ship, a management solely relating to the goods. This decision prevents us from holding (1.) that management of the ship in a contract between shipowner and cargo owner about the carriage of goods in the ship covers management of the cargo-carrying adventure; but does not, as I understand it, prevent a decision; (2.) that where part of the ship is managed, even primarily, for the purpose of protecting the cargo, still more (3.) where part of the ship is managed primarily for the purpose of making the ship fit for the adventure, with secondary results on the cargo, there is negligent management of the ship within the exception.

As my view of the facts is that, to repair the ship for the voyage, part of the ship, the hatches, was managed, but managed so negligently that cargo was damaged by rain, I think the case falls into the third class above, and is covered by the exception of negligence of the servants of the carrier in the management of the ship.

The learned judge below devotes the greater part of his judgment to the facts, and deals with the point under consideration in a few lines. He apparently thinks that the hatches are not a part of the ship, and that managing them for the purpose of repairing the ship is not management of the ship. He says the case falls within Art. III. (2.), and not Art. IV. (2.) (*a*); but as Art. III. (2.) is expressly said to be "subject to the provisions of Article IV.," I do not understand the remark. The obligation properly to keep and care for the cargo is expressly said to be subject to the "immunity" that if the cargo is damaged by careless management of the ship, the shipowner is freed from liability, and the hatches, ventilating, pumping, and refrigerating machinery, and ships' derricks, seem to me to be clearly part of the ship.

(1) [1900] P. 112.

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Scrutton L.J.

One small point remains. Clause 18 of the bill of lading reads as follows: "The following are not to be deemed to be sufficiently packed: (*a*) Tinplates in boxes unless tin-lined and iron-hooped." The tinplates in question were obviously, and, to the knowledge of everybody concerned, not so packed, and it is not the practice so to pack tinplates going to Canada, though the package is usual for tropical destinations. Now if the goods had, in fact, been insufficiently packed there is a statutory exception of "insufficiency of packing." This was neither pleaded nor proved; and we were asked to take clause 18 to mean that goods in fact sufficiently packed are to be deemed to be insufficiently packed, so that the ship is excused for damage by its negligence to goods which are in fact sufficiently packed, by a "deeming," which is contrary to the fact. This provision appears to me to weaken or lessen the liability of the shipowners as contained in Arts. II., III. and IV., and therefore to be null and void. Further, I do not think the clause would relieve the shipowner from liability for negligence other than in the management of the ship in relation to goods insufficiently packed which he has received to carry with full knowledge of the insufficiency of the packing. This exception or provision does not therefore, in my opinion, protect the shipowners; but I hold that the exception of negligence in the management of the ship does protect them. and therefore the appeal must be allowed and judgment entered for the appellants, with costs here and below. They must, however, pay the costs of the issue of fact on which they failed in the lower Court.

SARGANT L.J. In this case both the appellants and the respondents have accepted the findings of fact of Wright J., and, therefore, we must take it that the damage to the respondents' tinplates was due to the penetration of rain-water into No. 5 hold, where the tinplates were stowed; that only trifling, if any, damage was so caused during the one day, February 9, on which the ship was discharging in an ordinary dock at Liverpool certain lumber which had been

shipped at Swansea and stowed between decks immediately above No. 5 hold; and that the substantial damage was caused during the seven or eight weeks between February 10 and an early day in April, while the ship was in dry dock at Liverpool and undergoing repairs which had been occasioned by a collision with the dock-head as she was coming out on February 10. During this period the tail shaft had to be taken out, repaired, and replaced, and there was a necessary accompanying shifting of some of the cargo of tinplates in hold No. 5. There was also some scraping and painting of the 'tween decks, together with a constant coming and going of workmen, and, as I understand the learned judge, he has found that in the course of these operations the lower hatch above No. 5 hold was from time to time removed, and the hatchway was left insufficiently protected against the heavy rain which occurred during this period, with the result that (to quote his exact words) "during that period rain did get into the lower hold, and did get in in sufficient quantity to explain and to account for the damage which was observed."

In these circumstances, the question arises whether the appellants are freed from their prima facie liability to the respondents by reason of the provisions of Art. IV., r. 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, which, so far as material, are: "2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (*a*) act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship." Or, accepting what I think must be accepted, that there was some neglect or default in the supervision of the operations by the officers of the ship, was it a neglect or default "in the management of the ship"?

The learned judge's decisions in this action and in a similar action by other claimants in respect of a similar consignment of tinplates are reported, so far as questions of law are concerned. (1) The principal part of this report is occupied with a discussion of the question of liability on the

(1) [1927] 2 K. B. 432, 438.

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hypothesis that the cause of the damage to the respective consignments of tinplates had not been ascertained. This was in fact his finding of fact with regard to the other consignment, and was mentioned by him, though not adopted, as a possible alternative finding in the case of the appellants' consignment. On the present appeal it is unnecessary to consider this part of the report. The only material part of the judgment as reported is to be found in the last paragraph, where the learned judge says: "But if the tinplates were damaged through the negligent admission of rain-water into the hold at Liverpool, I do not think that that constituted a case of management of the ship. These words refer to matters affecting the ship as a ship—for instance, its safety, which might incidentally affect the cargo, such as the improper opening of sea connections so as to prejudice the ship's safety while also damaging the cargo."

The brevity of the learned judge's judgment on this point is probably due to the fact that it formed one only of a number of questions both of fact and law with which it had to deal; and, no doubt, he had not the advantage of so full a discussion and examination of the numerous authorities as we have had. And, further, since the date of his judgment there has been the decision in this Court on this very question of the scope of Art. IV., r. 2 (*a*), in the important case of *Hourani* v. *Harrison*. (1) Not only was the attention of the Court in that case solely occupied with this question, but most of the previous English decisions, and one or two important United States decisions, were referred to in the judgments of Bankes and Atkin L.JJ. We are, therefore, in a better position to solve the present problem than was Wright J.

Now, with great respect to the learned judge, he seems to me to have paid too little attention to the occasion, scope, and purpose of the operations in the course of which the negligent acts or omissions took place. In my opinion, if these operations are operations with regard to the ship as a whole, and for ship's purposes, and are not merely operations in

(1) 32 Com. Cas. 305.

relation to the cargo, then any negligence in conducting those operations are within Art. IV., r. 2 (*a*), although the result of the negligence may be limited to damage to cargo, and may not imperil or injure the ship at all. And I think that this view underlies all the decisions, and is, if not expressed, at any rate implied in the language of most, if not all, of the judgments.

For instance, in *Hourani* v. *Harrison* (1) Bankes L.J. says: "In order therefore to bring any particular matter within the exception it must be something which can definitely be said to be in the management of the ship." And again (2): "The more one looks into the authorities the more authority one finds for the proposition that such an act as this, a mere discharging of the cargo, cannot properly be said to come within the expression 'management of the ship'"; and Atkin L.J. says (3): "The stevedores brought in were employed by the ship for the purpose of discharging the cargo, and that which was done was not a defect in the ship or a defect in the management of the ship as defined, but merely a default of a person dealing with a particular case of cargo." And on the same principle in *The Ferro* (4) Sir Francis Jeune and Barnes J. held that an act of damage done merely in the stowage of the cargo, and apart from anything done in reference to the ship, could not be held to be mismanagement of the ship.

Again, in *The Glenochil* (5), Barnes J. applied the same test. He said (6): "It certainly seems to me to be a fault in the management of the vessel in doing something necessary for the safety of the ship herself"; and, again, when the act "is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel.'" Further, in *Rowson* v. *Atlantic Transport Co.* (7), there is an adoption by Kennedy J. of the

(1) 32 Com. Cas. 309.
(2) Ibid. 310.
(3) Ibid. 321.
(4) [1893] P. 38.
(5) [1896] P. 10.
(6) Ibid. 18.
(7) [1903] 1 K. B. 114, 117.

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language of Barnes J. in *The Rodney* (1)—namely, "I think that the words 'faults and errors in the management of the vessel' include improper handling of the ship as a ship, which affects the safety of the cargo"; and in the Court of Appeal in the same case (2) the reasoning proceeds on the same lines, particularly in the elaborate judgment of Stirling L.J. To the same effect is the judgment of Holmes J. in *The Germanic* (3), where, after referring to *The Glenochil* (4) and to *The Silvia* (5), he said: "If the primary purpose is to affect the ballast of the ship, the change is management of the ship; but if . . . . the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section [of the Harter Act] removes from the operation of the third. We think it plain that a case may occur which in different aspects, falls within both sections, and if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss."

Now, in the present case it is clear that the operations on the *Canadian Highlander* in the course of which the hatchway leading to hold No. 5 was left wholly or partially open, and so allowed the penetration of rain into that hold, were operations for the purpose of repairing damage to the structure of the ship, and of scraping and painting parts of the ship, and had nothing at all to do with the care of the cargo. Had the 'tweendecks hatch been removed for cargo purposes, as, for instance, for the ventilation of the cargo, and there had then been negligence in replacing the hatch or otherwise covering the hatchway, the result might have been different: see, for instance, *Andean Trading Co.* v. *Pacific Steam Navigation Co.* (6), though I express no definite opinion on the matter in view of the remarks of Scrutton L.J. to the contrary effect. But, as things stand here on the findings of fact of the learned judge, I have come to the conclusion

(1) [1900] P. 112, 117.
(2) [1903] 2 K. B. 666.
(3) 196 U. S. 589, 597.
(4) [1896] P. 10.
(5) 171 U. S. 462.
(6) 263 Fed. Rep. 559.

that the primary—or, rather, the sole—nature and purpose of the operations in which the negligence occurred concerned the ship as a whole; and, accordingly, that the appellants are protected from liability by Art. IV., r. 2 (*a*).

In the view I have taken it is not necessary to deal with the second defence of the appellants, which is based on the particular language of the document in this case, and is said to be rendered void by Art. III., r. 8.

I agree that the appeal should be allowed.

GREER L.J. This is an appeal by the defendants, who are the owners of the steamship *Canadian Highlander*, from a judgment of Wright J. awarding the plaintiffs damages for breach of contract evidenced by a bill of lading of which the plaintiffs were the holders.

The question raised by the appeal is whether the defendants are entitled to be relieved from liability to compensate the plaintiffs for the damages they sustained through injury to a quantity of tinplates shipped in the *Canadian Highlander* under the contract of carriage, on the ground that they are protected by the words of Art. IV., r. 2 (*a*), of the Schedule to the Carriage of Goods by Sea Act, 1924.

The defendants also relied on a clause in the bill of lading which reads as follows: "18. The following are not to be deemed to be sufficiently packed: (*a*) tinplates in boxes unless tin-lined and iron-hooped." Other questions were involved in the action when heard by Wright J., but the above were the only ones that survived and were argued in the Court of Appeal.

The first question may be stated broadly thus: Is the failure to utilize the hatch-covers or tarpaulins of the ship, with care for the protection of the cargo, an act, neglect, or default in the management of the ship within the meaning of the said Rule, when it cannot be said, or at least has not been proved, to be an act, neglect, or default with regard to the safety, or with regard to the condition or purposes of the ship itself? The learned judge held that the act, neglect or default proved by the evidence was not an act,

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neglect or default in the management of the ship within the meaning of the said Article.

The material facts may be quite shortly stated :—

The tinplates were shipped at Swansea, under a bill of lading dated February 6, 1925, for carriage to Vancouver. The bill of lading had pasted on it the paramount clause giving effect to the provisions of the Carriage of Goods by Sea Act, 1924, and the Articles comprised in the Schedule thereto. By s. 3 of the Act it is necessary for every bill of lading to contain a clause to this effect. The vessel sailed from Swansea, and on her way to Vancouver arrived at Liverpool to discharge some lumber and take in additional cargo. The tinplates in question were in No. 5 lower hold, and the lumber was stowed in the 'tweendecks of that hold. The lumber was discharged on February 9 through the hatchway of No. 5 hold. A good deal of rain fell during part of the time occupied by the discharge. As I understand the learned judge's findings of fact, he decided that the 'tweendecks' hatches were insufficiently protected by tarpaulins, and some rain penetrated to the lower hold and caused some damage to the plaintiffs' tinplates. The vessel was moved on February 10, and unfortunately met with an accident by striking the pierhead. She was found to be damaged, and was taken to dry dock for repairs. It was then discovered that in addition to the repairs necessitated by the accident, she required a new liner to the tail shaft. This made it necessary for the repairers to descend into No. 5 lower hold, and do a good deal of work there, the nature of which it is unnecessary to describe in detail. While the repairers were at work, the defendants' sailors seized the opportunity of doing some painting in the 'tweendecks. There was rain on some of the days when the work was being done, which somehow or other fell on the plaintiffs' boxes of tinplates, which extended about halfway across the lower hatchway from the after end towards the forward end. The ladder leading to the hold was at the after end of the hatch, and the learned judge came to the conclusion that at some time or other the defendants' employees on board the ship must have negligently omitted to

see either that the hatch-covers or tarpaulins were replaced after the men descended to their work, or that the opening in the hatch was not covered by a tarpaulin. He did not find, and on the evidence in my opinion he could not find, that there was any neglect of the safety or of the condition of the ship itself, or any negligence towards the ship itself or any part of it. I treat his judgment as meaning that if there was no cargo to be considered, the occasional omission to completely cover the hatchway would not have constituted negligence at all. I agree with this view.

The conclusions of the learned judge are stated as follows: "The conclusion, therefore, I arrive at . . . . is that rain did get into the hold during the period of the repairs at Liverpool and also during some part of the discharge of the lumber at Liverpool, and that rain accounted for the exceptional damage." His final conclusion is stated thus: "Mr. Miller further relied on Art. IV., r. 2 (*a*), and contended that if there was neglect on the part of the defendants' servants, it was 'in the management of the ship,' so that the defendants would be excused. But if the tinplates were damaged through the negligent admission of rain-water into the hold at Liverpool, I do not think that that constituted a case of management of the ship. These words refer to matters affecting the ship as a ship—for instance, its safety, which might incidentally affect the cargo, such as the improper opening of sea connections, so as to prejudice the ship's safety while also damaging the cargo. The principle was so stated in *Rowson* v. *Atlantic Transport Co.* (1), where it was somewhat subtly applied to the management of refrigerating machinery, but on the ground that its functions were not limited to cooling cargo. I think that in the present case the protection of the tinplate cargo fell under Art. III., r. 2, and not under Art. IV., r. 2 (*a*). Any other view would in effect nullify the former provision." In my judgment the learned judge was right.

The material Rules in the Schedule to the Act are Arts. II., III., r. 2, and Art. IV., r. 2 (*a*). Art. II. says: "Subject to the provisions of Article VI., under every contract

(1) [1903] 2 K. B. 666.

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of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth." Art. III., r. 2, says: "Subject to the provisions of Article IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." Art. IV., r. 2, says: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship."

In interpreting these Rules it is not immaterial to consider the circumstances which gave rise to the enactment of the statute which gives the force of law to these Rules. In 1893 the Congress of the United States of America passed the Harter Act. This Act provides by s. 2 that it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to insert in any bill of lading or shipping document any covenant or agreement "whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver the same, shall in any wise be lessened, weakened, or avoided." As pointed out by Mr. Jowitt in his argument for the respondents, this is not a provision imposing a duty to take care, but is a declaration that the shipowner is not to limit his common law obligation to carry and deliver the cargo by exceptions relieving him, his master, officers, servants, or agents, from the duty of exercising care in the handling, stowing, caring for, and delivery of the cargo. Sect. 3 then proceeds to provide "that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation,

or in the management of the said vessel." After the Harter Act was passed, several other countries, including some British Colonies, legislated on similar lines, but not in every case using similar words. It was felt by a large number of shipowners, merchants, and bankers in this and other countries that it was desirable to make the law of the countries interested in international trade as nearly as possible uniform with regard to the matters dealt with by the Harter Act, and recommendations were made by an international body to the British Legislature, which resulted in the passage of the Carriage of Goods by Sea Act, 1924. It seems clear that s. 3 of the Harter Act when incorporated in a British bill of lading ought to be read as a limitation of the liability of the shipowner as a common carrier, and ought to be interpreted as an exception clause, and any decision of our Courts as to its meaning is an authority which can be properly applied to the similar exception clause in the Carriage of Goods by Sea Act, 1924. Further, I think it is incumbent on the Court not to attribute to Art. IV., r. 2 (*a*), a meaning that will largely nullify the effect of Art. III., r. 2, unless they are compelled to do so by clear words. The words "act, neglect or default in the management or navigation of the ship," if they are interpreted in their widest sense, would cover any act done on board the ship which relates to the care of the cargo, and in practice such an interpretation, if it did not completely nullify the provisions of Art. III., r. 2, would certainly take the heart out of those provisions, and in practice reduce to very small dimensions the obligation to "carefully handle, carry, keep, and care for the cargo," which is imposed on shipowners by the last mentioned Rule. In my judgment, a reasonable construction of the Rules requires that a narrower interpretation should be put on the excepting provisions of Art. IV., r. 2 (*a*). If the use of any part of the ship's appliances that is negligent only because it is likely to cause damage to the cargo is within the protection of Art. IV., r. 2 (*a*), there is hardly anything that can happen to the cargo through the negligence of the owner's servants that the owner would not in actual practice be released from. To

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hold that this is the effect of Art. IV., r. 2 (*a*), would reduce the primary obligation to "carefully carry and care for the cargo during the voyage" to a negligible quantity. In my judgment, the reasonable interpretation to put on the Articles is that there is a paramount duty imposed to safely carry and take care of the cargo, and that the performance of this duty is only excused if the damage to the cargo is the indirect result of an act, or neglect, which can be described as either (1.) negligence in caring for the safety of the ship; (2.) failure to take care to prevent damage to the ship, or some part of the ship; or (3.) failure in the management of some operation connected with the movement or stability of the ship, or otherwise for ship's purposes. It is worth while noting that Art. IV., r. 2 (*a*), is not directed to acts, neglects or defaults in the course of management of the ship, but acts, neglects or defaults in the management of the ship. All the cases in our Courts where the ship has been held to be excused come under one or other of these heads. The decisions of the English Courts on the meaning of the Harter Act (when made part of an English bill of lading), and on the Carriage of Goods by Sea Act, 1924, seem to me to be in accord with the view of the law above stated. In *The Glenochil* (1) the President, Sir Francis Jeune, and Barnes J. held that the shipowner was protected from liability for damage caused by the negligent way in which the process of filling the water ballast tanks to stiffen the ship during discharge was carried out. The stiffening was done in order to keep the ship afloat in proper trim, and was for the benefit of the ship, as a ship. It was held that the negligence complained of was negligence in the management of the ship within the meaning of s. 3 of the Harter Act, which had been incorporated in the bill of lading contract. That case is distinguishable from the present in that the act complained of was the negligent management of an operation done for the purposes of the ship, as a ship, and, as this negligence resulted in damage to the cargo, the ship was held to be protected by s. 3 of the Harter Act. The negligence

(1) [1896] P. 10, 16.

complained of was negligent treatment of the ship as a ship indirectly affecting the cargo. In giving judgment, the President pointed out that the word "management" of the said vessel was not merely co-extensive with navigation, but at any rate went "far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself," and after referring to the judgment in *The Ferro* (1) he uses these words: "The distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of vessel indirectly affecting the cargo." If this is the correct way of describing the legal effect of the material words in the Harter Act, it seems to me to mean this, that the shipowner has to prove two things in order to bring himself within the protection of s. 3: (1.) that there was some act or neglect that can be described as want of care of the vessel, and (2.) that damage to the cargo was indirectly caused thereby. As I have already indicated, the evidence in this case failed to establish any want of care of the vessel, but only want of care of the cargo, consisting of a failure to use the hatch covers and tarpaulins sufficiently to afford adequate protection of the cargo. Barnes J. in giving judgment said (2): "I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel.'" Having regard to the words I have quoted from the judgments, it seems to me that *The Glenochil* (3) is an authority in favour of the plaintiffs' contentions in the present case.

The facts in the next case, *The Rodney* (4), were that during the voyage the vessel met with heavy weather, and, the forecastle becoming flooded, the boatswain, whilst endeavouring, with the aid of a poker, to clear a pipe used to carry off

(1) [1893] P. 38.
(2) [1896] P. 10, 19.
(3) [1896] P. 10.
(4) [1900] P. 112.

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the drainage, drove a hole through it, thereby admitting water into the forehold, which damaged a portion of the cargo. It was decided that there was a fault or error in the management of the vessel, and the shipowner was protected by s. 3 of the Harter Act, which had been made part of the contract of carriage. There it is clear that the negligent act complained of which damaged the cargo was an act done for the purposes of the ship which actually damaged part of the ship. The negligence was negligence in respect of the ship which indirectly damaged the cargo. In giving judgment Barnes J. said (1): "Practically there is very little difference, if any, between the case of *The Glenochil* (2) and this case, except that in the former case there are to be found some expressions referring to the act as being done for the safety of the ship, but those expressions were not intended to limit the meaning of the words 'management of the ship.' I think that the words 'faults or errors in the management of the vessel' include improper handling of the ship, as a ship, which affects the safety of the cargo."

The next case to be considered is *Rowson* v. *Atlantic Transport Co.* (3) This is the authority referred to by Wright J. in support of his judgment. The actual decision in that case was that the negligent management of the refrigerating apparatus, which was installed in the ship partly to preserve the cargo, and partly to preserve the food used by the crew, amounted to a fault or error in the management of the ship, and therefore the shipowner was protected by s. 3 of the Harter Act, which was incorporated in the contract of carriage. But it is clear that the ground for the decision was that as the apparatus was used not merely for the purpose of preservation of the cargo but also for the purposes of the ship herself as a ship, the negligence was accordingly negligence in the management of the ship. Vaughan Williams L.J. states his view of the proper construction of s. 3 by saying that the words "in the management of the vessel" mean "in the management of the vessel, qua vessel." Romer L.J. in

(1) [1900] P. 112, 117. (2) [1896] P. 10.
(3) [1903] 2 K. B. 666.

his judgment asks himself the question whether the negligent engineer was acting in the ordinary course of his duties and on behalf of the vessel regarded as a whole, or was he acting solely, or in particular, in looking after the cargo and for the purposes of the cargo, and as he came to the conclusion that he was acting on behalf of the vessel regarded as a whole, and not merely or particularly on account of the cargo, he came to the conclusion that (1) "the mismanagement of the pipe was a mismanagement of it in working the pipe qua pipe, as I have said, and as part of the vessel." Further on, on the same page, he says: "In any point of view it was, in my judgment, an act of negligence by an officer of the ship in the performance of his duties to the ship as a ship, not with regard to any particular cargo, and was such an act as really concerned the management of the vessel as a whole, and, therefore, in my opinion, really came within the express limitation in s. 3 of the Act." Stirling L.J. in his judgment says (2): "If the refrigerating chambers or refrigerating machines were entirely devoted to cargo, and the neglect had been, as it was in the present case, the act of turning a handle which intercepted the supply of oil to this particular spot in the machine, I should have felt very great hesitation in saying that was not neglect in taking proper care of the cargo; and for a long while I was under the impression that that really represented the state of things here, and that the negligent act had nothing to do really with the general management of the vessel, but simply with the management of a portion of the vessel which was exclusively appropriated to the cargo. But it now turns out that the refrigerating portion of the vessel does include chambers which are applied and used for carrying provisions for the ship, and these are worked with precisely one and the same apparatus as the chambers which are devoted to the preservation of the cargo. The duties of the particular engineer in charge were not limited, as I understand, to taking care of the cargo, or indeed to this particular portion of the refrigerators; and although I think the case very near the

(1) [1903] 2 K. B. 678. (2) [1903] 2 K. B. 682.

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line, it does seem to me that I ought to come to the conclusion that the fault or error was committed in the management of the vessel within the meaning of section 3 of the Harter Act."

The only other case that I think it necessary to consider is *Hourani* v. *Harrison*. (1) The actual question involved in that case was whether theft by the stevedore's men at Mexican ports amounted to mismanagement of the ship within the meaning of Art. IV., r. 2 (*a*), of the Schedule to the Carriage of Goods by Sea Act, 1924. The decision is a decision of the Court of Appeal, and though the facts of the case are not in any way similar to the facts in the present case, it seems to me that the judgments of Bankes and Atkin L.JJ. are only consistent with the construction of a contract similar to that decided in *Rowson's* case (2) with regard to the construction of the Harter Act, and similar to that which I have indicated in the earlier part of this judgment. Bankes L.J. quotes with approval the passages from the judgment of the President in *The Glenochil* (3), which I have cited above, and also the judgment of Vaughan Williams L.J. in *Rowson's* case. (2) He cites with approval the judgment of Holmes J. in *The Germanic* (4), including that part of the judgment which approves the words of Barnes J. in *The Glenochil* (3), that in order to be within the protection of s. 3 of the Harter Act, the faults or errors should be primarily connected with the navigation of the vessel, and not with the cargo ; and Atkin L.J. says (5) : " It appears to me that here we are not dealing with anything which is or can be said to be part of the ship as a ship." He also said (6) : " I do not propose to add anything at any length to what has been said by my Lord, with whose judgment I entirely agree, but I think perhaps one might point out this, that in this statute it is plain that a very clear distinction is drawn between dealings with goods and dealings with ships, and that 'ship' is defined in the Act. 'Ship' is defined as being 'any vessel used for the carriage

(1) 32 Com. Cas. 305.
(2) [1903] 2 K. B. 666.
(3) [1896] P. 10.
(4) 196 U. S. 597.
(5) 32 Com. Cas. 305, 321.
(6) Ibid. 318.

of goods by sea'; and it is quite plain that what is meant by 'ship,' when the word is used, is the actual vessel, the res, the actual thing itself. One will find phrases in Article IV. that 'Neither the carrier nor the ship shall be responsible for loss,' and in paragraph 2: 'Neither the carrier nor the ship shall be responsible for loss'; that means that the ship as a res shall not be responsible for loss; and while it is quite true that, in general language, in another context, 'management of the ship' might be construed as meaning management of the business of carrying goods by ship, it seems to me plain that that is not the meaning here, but that there is a clear distinction drawn between goods and ship; and when they talk of the word 'ship,' they mean the management of the ship, and they do not mean the general carrying on of the business of transporting goods by sea. The effect of it is that, in the words of Gorell Barnes J. in *The Rodney* (1), 'Faults and errors in the management of the vessel include improper handling of the ship as a ship which affects the safety of the cargo,' and that construction merely follows, I think, and was intended by the learned judge to follow, his decision in *The Glenochil*. (2) Both those cases of *The Glenochil* (2) and *The Rodney* (1) are supported in terms by Stirling L.J. in *Rowson* v. *Atlantic Transport Co.* (3), to which my Lord has referred, and I think that those statements of the meaning of the word 'management' must be taken, so far as this Court is concerned, as being authoritative."

As I read the decisions of the English Courts, especially the two cases in the Court of Appeal, they mean this: If the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability; but if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved. I respectfully agree with

(1) [1900] P. 112. (2) [1896] P. 10.
(3) [1903] 2 K. B. 666, 680.

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this view, but whether or not it ultimately proves to be a right construction of the Act, I think in this Court we ought to follow the opinions expressed by this Court in those cases.

With regard to the point made by Mr. Miller on clause 18 of the bill of lading, I think it is unnecessary to say more than this: if my judgment is right, the clause cannot operate as a defence when there is a cause of action for negligence. If I am wrong, then the defendants are entitled to judgment without any need to rely on this clause.

I am of opinion that this appeal should be dismissed with costs, but, as the other members of the Court think differently, it will be allowed with costs.

Appeal allowed.

Solicitors for appellants: *Botterell & Roche.*
Solicitors for respondents: *W. A. Crump & Son.*

J. S. H.

[IN THE COURT OF APPEAL.]

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SOCIÉTÉ ANONYME PÊCHERIES OSTENDAISES *v.* MERCHANTS' MARINE INSURANCE COMPANY.

[1926. S. 2731.]

Costs—Taxation—Action to recover under Marine Policy—Costs incurred before Action—Order for filing of Affidavit of Ship's Papers—Stay of Proceedings meanwhile—Costs incurred during Stay of Proceedings—Action settled after filing of Affidavit, the Defendants to pay Plaintiffs' taxed Costs—Objection to Costs incurred before Action and to Costs incurred during Stay of Proceedings—Prematureness—R. S. C., Order LXV., *r.* 27, *sub-r.* 29.

In the taxation of costs the Taxing Master has discretion under Order LXV., r. 27, sub-r. 29, to decide whether costs incurred before action brought were necessary or proper for the attainment of justice, and, if so, to allow them.

So *held* by Lord Hanworth M.R. and Atkin L.J.

Where in an action on a marine policy the usual order is made for the filing of an affidavit of ship's papers and for a stay of proceedings meanwhile, this stay does not operate to paralyse the activities of either party and prevent him preparing his case; and on a taxation of costs it is for the Taxing Master to determine, having regard to the stay and all other material factors, whether the costs were reasonably or prematurely incurred.

So *held* by the whole Court of Appeal.

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APPEAL from MacKinnon J.

The plaintiffs' steam trawler, *Nerée*, was lost at sea on February 25, 1926. The plaintiffs had the hull and machinery (valued at 3500*l.*) insured with the defendants and other underwriters for the year ending June 12, 1926, against usual perils, and they claimed against the underwriters in respect of a total loss. On May 7, 1927, the defendants' solicitors wrote to the plaintiffs' solicitors that their inquiries so far as they had at present gone showed that the loss of the vessel was not due to a peril insured against, and added, "You may take it therefore as at present advised that the claim will be resisted." On July 16, 1926, this intimation was repeated verbally, and on July 20, 1926, the writ in the action was issued claiming to recover on the insurance policy the sum of 778*l.* subscribed by the defendants. On July 28, 1926, an order was made on the summons for directions that the plaintiffs should give 100*l.* security for costs and that the action should be stayed until this had been done and also that an affidavit of ship's papers should be filed and "in the meantime all further proceedings be stayed." The affidavit of ship's papers was made on January 25, 1927, but was not filed until March 5, 1927, when the points of claim were also delivered. Security for costs was given on February 1, 1927. On May 20, 1927, the action was settled and all further proceedings stayed, except that the defendants were to pay to the plaintiffs their costs of the action to be taxed.

The plaintiffs' bill of costs included items of costs incurred during the stay of proceedings in taking evidence and in having points of claim prepared by counsel; and the item of 126*l.* carried in under "Instructions for Brief," which included costs incurred before action brought in obtaining evidence from the master and crew of the sunk trawler and other seafaring men.

Objections were taken by the defendants to these items and also to the fee of Messrs. Camps (consulting engineers and marine surveyors) incurred during the stay on the ground that these costs were prematurely incurred. The Master allowed the items, but on the item, "Instructions for Brief,"

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allowed fifty guineas only. He gave as his answer to the objections: "The usual form of order for production of ship's papers ends 'in the meantime all further proceedings be stayed.' I understand this to mean no further proceedings in the action must be taken until the affidavit is filed—for instance orders for trial or orders how the evidence should be taken (*American Trading Co.* v. *London General Insurance Co.* (1923) 14 Ll. L. Rep. 297). I do not understand that the order entirely paralyses the plaintiff so that he cannot do anything by way of preparation for his real proceeding. If this is so, the question whether any act of the plaintiff during that period is or is not premature must be, like every other question about premature acts, a question of reasonableness to be decided by me. If I am right in my view of the effect of the order and that the matter is one in which I can exercise my discretion, then I consider the items not premature under the circumstances. If I am wrong the items must necessarily be disallowed."

Upon an application for a review of the taxation MacKinnon J. allowed the defendants' objections to the several items specified in the objections and disallowed these items.

The plaintiffs appealed.

Le Quesne K.C. and *K. S. Carpmael* for the appellants. The costs that have been disallowed fall into two classes—namely, those incurred before action brought and those incurred during the stay of proceedings. The Master's answer was correct and the question involved was for him only, and MacKinnon J. ought not to have disturbed his decision. There is nothing to distinguish a stay of proceedings pending production of ship's papers from a stay of proceedings until security for costs is given. In the latter case the stay does not disentitle a party incurring costs during the stay from recovering them, if they are otherwise proper: *Whiteley Exerciser, Ld.* v. *Gamage.* (1) But that is not an entirely satisfactory authority, for the stay in that case was limited to

(1) [1898] 2 Ch. 405, 412.

the plaintiffs' proceedings, and the costs were incurred by the defendant.

[ATKIN L.J. Is not the only question whether the costs were incurred prematurely ?]

That is the appellants' contention; and, if so, it was for the Master to decide it: *Harrison* v. *Leutner*. (1) Order LXV., r. 27, sub-r. 29, provides that "on every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party." That applies notwithstanding the stay. The question whether the costs were reasonably incurred is one for the Taxing Master.

Again the position is the same in regard to costs incurred before action brought. The Taxing Master can in the exercise of his discretion allow them if they were necessary or proper: *Bright's Trustee* v. *Sellar*. (2) Here the Master only allowed fifty guineas instead of the sum of 126*l*. claimed on the item "Instructions for Brief," and it is not clear that he allowed any costs incurred before action brought.

Simey for the respondents. The object of obtaining an affidavit of ship's papers is to ascertain facts which are not within the knowledge of the underwriters, and until they are supplied the underwriters cannot finally decide whether to contest the claim. It is therefore of great importance to insurance companies that during the stay pending production of ship's papers the plaintiffs should not be allowed to run up a large bill of costs. It was a long time before the affidavit of ship's papers was filed, and there is correspondence which suggests that even then it was not complete. It is not suggested that by incurring costs the plaintiffs were disobeying the order of the Court or guilty of contempt, but the costs were prematurely incurred.

[LORD HANWORTH M.R. The respondents must go further than this and say that the plaintiffs could not incur costs so as to throw the liability for them on the unsuccessful defendants.]

(1) (1881) 16 Ch. D. 559. (2) [1904] 1 Ch. 369.

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It is not suggested that they were paralysed—as the Master put it—but that if they incurred costs during the stay they could not throw the liability on the defendants. Any such costs were necessarily prematurely incurred. Here the plaintiffs rushed to the conclusion that the defendants were going to set up the defence that the trawler was scuttled.

[LORD HANWORTH M.R. The defendants' letter intimating that they were going to resist the plaintiffs' claim on the ground that the ship's loss was not due to a peril insured against, suggested in the case of a ship that had foundered that such a plea was going to be set up.]

The plaintiffs were premature in assuming so. They incurred costs as a matter of luxury and cannot throw the burden on the defendants.

In any case how could any costs be allowed in respect of costs incurred before action brought? There must be a limit to the Taxing Master's discretion, and the practice has been not to allow costs incurred before action brought.

No reply was called for.

LORD HANWORTH M.R. In my judgment this appeal succeeds. It raises a somewhat novel point, and, from the large bearing that it may have, an important point.

On February 25, 1926, the plaintiffs' trawler, which was insured by the defendants, was lost at sea. Very soon after the facts as to the loss were ascertained, the plaintiffs were notified, by a letter dated May 7, 1926, that the underwriters had determined to fight the case on the ground that the loss was not due to a peril insured against. The trawler had foundered, and it is not difficult to see that among the possible charges suggested by the attitude taken up by the insurers, there might be a charge that the plaintiffs had scuttled the vessel. Whether that was specifically the intention of the insurers or not, the plaintiffs were at any rate told that for the purpose of their success in the action, it would be necessary for them to be prepared with evidence to meet the insurers' contention that the loss was not due to a peril insured against.

In consequence of that notification the plaintiffs and their advisers sent over to the Continent in June, 1926, to take the statements of the crew of the trawler. The members of the crew were under contract to serve in other vessels, so that they might later be employed upon the high seas in different directions, and their evidence be lost if steps were not taken immediately to secure it. On July 20, 1926, the writ was issued, and on the next day a letter was written by the defendants as to obtaining the usual agreement that all the underwriters would be bound by the decision in the action. On July 28 an order was made on the summons for directions for ship's papers. That order is in the usual form, and provides for a stay until the order for the ship's papers had been complied with. First of all, there was an order for security for costs in the sum of 100*l.*, and a stay meantime; and then the usual order for ship's papers, "and that in the meantime all further proceedings be stayed." In October the plaintiffs obtained some further statements of witnesses and also the opinion of the engineer Mr. Camps. On January 25, 1927, the affidavit of ship's papers was prepared, but it was not communicated to the defendants. In March, the documents which had been catalogued in the affidavit of ship's papers were ready, and then, and not until then, communication was made to the other side that the ship's papers were then ready for delivery, and on March 5, 1927, the affidavit of ship's papers was filed. On May 20, 1927, the action was settled on terms under which the plaintiffs recovered, and were to be paid by the defendants their taxed costs.

Upon the taxation, questions arose as to three categories of costs. There were, first, the costs incurred before the action was commenced; secondly, the costs incurred after the writ had been issued and before the order for ship's papers was made; and, thirdly, the costs incurred during the stay of proceedings directed in the order for ship's papers. When the costs were brought before the Master for taxation objection was taken to them on the ground that there was a stay of proceedings pending the giving of security for

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costs and the filing of an affidavit of ship's papers, and the defendants submitted that the items which had been incurred up to the time when that stay was removed were premature. The Master made an order allowing in form some costs incurred apparently before action, some costs incurred subsequently, but before any stay of proceedings was imposed, and some costs incurred during the time when the stay operated. On December 19 MacKinnon J. disagreed with the decision of the Master, and ordered that the costs incurred before action and during the stay should be disallowed; and from that decision the appeal is taken to this Court. The result is that the question is raised whether it is proper to allow, first, any costs incurred before action brought; and secondly, any costs incurred during the time when the stay operated.

With regard to costs generally, it must be borne in mind that Order LXV., r. 27, sub-r. 29, allows a very wide discretion to the Taxing Master, and I do not desire to say anything to circumscribe that discretion in any way. The rule has been drawn in wide terms in order to give a wide latitude to the Taxing Master's discretion. It is said that no costs ought to be allowed which have been incurred before action brought. That would be to state the proposition far too widely. In the course of the arguments in *Bright's Trustee* v. *Sellar* (1) Swinfen Eady J. asks: "Can he"—that is the Master—"allow the costs of a transcript obtained before action?" And it is answered in this way: "It is a matter of discretion. . . . . His discretion is not confined to costs incurred after action"; and a reference is made to the sub-rule to which I have already referred. Swinfen Eady J. in that case adopted the Master's view that certain expenses should be allowed in the bill which had been incurred before the action was brought, and gave as his reason that the expense proved useful in the action, and had been incurred at a time when it was right and proper that the outlay should be made in order to safeguard the position of the intending litigant.

(1) [1904] 1 Ch. 369, 371.

It appears to me, therefore, that there is power in the Master to allow costs incurred before action brought, and that if the costs are in respect of materials ultimately proving of use and service in the action, the Master has a discretion to allow these costs, which he probably will exercise in favour of the party incurring them, because they have been made use of during the course of the action.

Then I come to the next class of costs—namely, costs incurred after action brought and before the stay. As to those, it appears clear that just as all other costs which have been incurred in and during the action subsequently to writ issued are in the discretion of the Master, so the costs to which objection has been taken—namely, the obtaining of certain evidence—would fall within the discretion of the Master. It is said that it cannot then be clear what will be the issues between the parties, and therefore that the outlay then made was obviously unnecessary and ought not to be allowed. The answer is that if it was a prudent outlay, then the Master has power to allow it; and it is for him to judge as to whether or not an outlay made subsequent to the issue of the writ was such as might reasonably be included in the costs to be taxed between the parties.

Then comes the more important point upon which the appeal has been presented to us. MacKinnon J. has held, apparently, that the stay of proceedings included in the order for ship's papers prevents any costs incurred while that stay was operative from being recovered. I take note that the stay is of "All further proceedings." It is not a stay of activities, the steps which prudence dictates are not forbidden. The question whether the steps that are taken are or are not premature is a matter for the Taxing Master. I agree with the answer made by Sir George King in these terms: "I do not understand that the order entirely paralyses the plaintiff so that he cannot do anything by way of preparation for his real proceedings. If this is so, the question whether any act by the plaintiff during that period is or is not premature must be like every other question about premature acts, a question of reasonableness to be decided

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by me." I think that Sir George King has rightly answered the objection carried in.

In *Harrison* v. *Leutner* (1) Sir George Jessel approved of the answers made by the Taxing Masters, who said: "We have always acted upon the principle that the costs of all work in preparing, briefing, or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of any notice which stops the work, are allowable; and . . . . the Taxing Master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper and the time for doing it had arrived." Those words seem to contain a working rule which properly exhibits the discretion which is entrusted to the Masters.

I also would adopt, myself, the words used by North J. in considering in *Whiteley Exerciser, Ld.* v. *Gamage* (2), whether or not the activities of the parties' advisers had been paralysed or sterilised by a stay of proceedings until security for costs was given: "If he had said that he was prevented from preparing them"—that is, the affidavits for which a motion had been adjourned—"by the order which stayed the plaintiffs' proceedings until security for costs had been given, he might have expected that the Court would laugh at him."

It appears clear to me that the order staying proceedings was not intended to do more than prevent unnecessary steps being taken in the action itself. It was not intended to prevent such activity as would contribute to the success of the party ultimately, and if a step, such as the collection of evidence, was necessary because the witnesses might be dispersed, it cannot be said that it was a matter falling within the purview of the order staying proceedings and that no such expense should be incurred and no such activity engaged in.

For those reasons, it appears to me that the Master's answers to the objections were right, and that MacKinnon J.'s order setting those answers aside is wrong. The appeal must be allowed, and the answers of the Master to the objections upheld with the taxation.

(1) 16 Ch. D. 559.

(2) [1898] 2 Ch. 405, 411.

ATKIN L.J. I agree. This case has been put before us as one of some importance to underwriters, and I agree that it is. The question arises in respect of costs incurred in an action on a marine policy, partly before the action was brought, and partly during the time during which there was a stay of proceedings under an order for ship's papers. The action was begun on July 20, 1926. On July 28 an order was made for ship's papers, which was not in fact complied with until a date in March, 1927, so that there was a long period during which the stay ordered under the usual order for ship's papers was operative.

In the first place it is necessary to consider what are the actual terms of the order. The terms of the order are: "That the plaintiffs and all persons interested do produce and show all papers . . . . and that in the meantime all further proceedings be stayed." I think it is important to compare that with a similar and concurrent stay which was imposed in the same order, an order that the plaintiffs (who were foreign plaintiffs) should give security for costs within a month, and that "otherwise all further proceedings in this action be stayed." As far as the legal operation of those two forms of words is concerned, I find myself quite unable to discern any difference. I think they have precisely the same effect, and therefore, in dealing with the question of costs incurred while a stay of proceedings is current, I think I ought to regard the matter as though it made no difference whether the stay was granted by reason of an order for security for costs, or of an order for ship's papers, or of any other order.

One of the defendants' contentions was that the effect of the stay of proceedings was that the plaintiffs could not recover any costs incurred by them during that period—that they were, as the Taxing Master has put it in his answers to the objections, "paralysed." That seems to me to be quite an incorrect view of the effect of the order. All that the order does is to stay proceedings, and "proceedings" obviously do not include the preparations which may be made by the parties by seeing witnesses, taking proofs,

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carrying on correspondence, and so forth. "Proceedings" are such proceedings as are, for instance, taken into account in dealing with the provisions of the Arbitration Act, 1889, s. 4. The applicant for a stay under that section cannot obtain it if he has himself taken any step in the proceedings, and by a step is meant the delivery of a pleading, which is specially referred to, or some step analogous thereto, such as taking out or appearing on a summons. To my mind it is quite a mistake to suppose that an order to stay proceedings amounts to a direction to the parties to hold their hands from the time when the order is made and to indulge in no further activities with a view to ascertaining the facts, procuring evidence and so forth. Such a view would be quite contrary to the ordinary practice. There is no doubt that while a stay is pending until security for costs is given or during any other period, it is the common practice of diligent plaintiffs and defendants to use that time in making preparations for the trial of the case. They may, of course, go too far and make excessive preparations, and if they make excessive preparations it may well be that the costs will not be allowed; but it is quite plain that nobody understands the order for a stay as directing them to do nothing in the action, and I am quite clear that that is not the legal effect of it.

What then is the position in this action on a marine policy? It seems to me to be that the Court has ordered a stay in order that the defendants may be put in possession of all the written documents that are in the possession of the plaintiffs or parties interested, or which they can reasonably procure under the order; and I have no doubt that one object of that order is to give the defendants information which otherwise would not be in their possession, to enable them to make up their minds as to what they are going to do in the case—whether they are going to fight or yield, or whether they are going to admit part of the case and contest the remainder. I think the Master should always bear that particular object in mind when he is dealing with the question of costs incurred during that period; but

inasmuch as the parties are not stricken with paralysis, it is not true that no costs can be recovered merely because they have been incurred in that period. It is always a question of fact for the Taxing Master whether the costs were or were not reasonably incurred during that period, always bearing in mind the fact that there was a stay, and also (especially in marine insurance actions) the purpose for which the stay was granted. But subject to that, it seems to me that it is a pure question of fact in every case for the Taxing Master, who has to ask himself: "Was it or was it not reasonable under the circumstances for the plaintiff to incur the costs in question at the time at which he incurred them?"

If nothing had been said by the underwriters, and it was still in doubt whether ultimately they would or would not resist the claim, it might very well be that the plaintiffs would find themselves in a difficulty if they incurred elaborate expenditure to prove liability, and the underwriters subsequently admitted liability. But that is not this case. Here the defendants' solicitors had written at an early stage intimating that the defendants intended to resist liability, and expressing their reason in language which certainly might give rise to a reasonable apprehension on the part of the plaintiffs' advisers that the plaintiffs were going to be charged with fraud. It was a case in which the trawler had undoubtedly foundered at sea, and the suggestion made on behalf of the underwriters was that she was not lost by a peril insured against. That might, almost certainly would, convey to anybody concerned the suggestion that the ship's loss was due to some wilful act and not to a peril of the sea. In those circumstances the Taxing Master might, I think, very well take the view that it was reasonable, at the earliest stage possible, for the plaintiffs to take the evidence of the crew and the master of the trawler, for the purpose of establishing what the true cause of the loss was, and also to take the evidence of an experienced surveyor with a view to proving that the vessel's loss was in fact from a peril insured against, and not the result of wilful damage. As the ship had foundered the surveyor would have to advise by

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reference to reports of the ship's condition before she went to the bottom of the sea. All that the Taxing Master has taken into account here, and it appears to me to be purely a question of fact for him, so that there is no reason for upholding the objections which have been taken. It is for him to decide whether the costs were prematurely incurred or not; he has in the circumstances of the case decided that they were not, and it is entirely a matter for him.

The other matter that arises is as to the costs incurred before the action was commenced. That has nothing to do with the stay of proceedings, but it is a pure question whether or not the costs incurred before the writ was issued are costs which the plaintiffs can recover under an order for the costs of the action. Upon that question it appears to me to be very important to bear in mind that the Taxing Masters have got to apply the words of Order LXV., r. 27, sub-r. 29. That rule is the guiding rule in the taxation of costs. It is intended to sum up generally the principles upon which costs are awarded; and I cannot help thinking that if that rule were really rigorously applied by everybody—and by "rigorously applied" I mean applied in all cases and giving full effect to the width of its language—there would be many fewer complaints by successful litigants than there are at the present moment. It is a rule which is intended to give to the successful litigant a full indemnity for all costs reasonably incurred by him in relation to the action. It says in terms that the Taxing Master is to allow "all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice." That is the whole principle that the Taxing Master has got to apply.

It is quite obvious that those costs are not limited to costs incurred after the writ has been issued. Costs incurred before action brought are allowed every day to a limited extent, as appears by the Taxing Masters' Practice Notes, which, though not binding, govern the practice. I am not at all sure that the conventions fixed by the Masters are not too narrow, but they may be very wise, because they deal

with the costs of this kind which are commonly in dispute; but their discretion as to costs certainly extends beyond that. The Taxing Master has discretion in every case to decide whether the costs incurred before the action were necessary or proper for the attainment of justice; and the costs the Taxing Master has allowed in the present case may very well be included in that expression. A very good example of this was put in argument; it was a case of an accident happening owing to a railway bridge breaking down, when the railway bridge has to be replaced forthwith and the state of the bridge is said to be the cause of the action. In such a case it is essential that there should be an immediate inspection by skilled witnesses of the state of that bridge. In those circumstances the Taxing Master might well hold that such costs incurred before the issue of the writ were necessary for the attainment of justice, because the actual facts to be ascertained from such an inspection could not be ascertained at a later date; and of course the Taxing Master in coming to a conclusion would have to consider the probability of the defendant disputing liability. That again is purely a question of fact for the Taxing Master, and he has not misdirected himself. He says in this case that certain costs were properly incurred in taking evidence, and in doing what was necessary for the purpose of taking that evidence. I agree that the Taxing Master in this case seems to have been liberal. The costs allowed in this case strike me as being on a liberal scale, but then that is entirely a question for him, and not a matter with which we can interfere.

There is one other point which was raised by Mr. Simey—namely, that no costs can be properly incurred in an action until the issues have been defined; and he says that these costs were incurred before the defendants had delivered their defence or indicated what their defence would be. All I can say is that such a contention goes very much too far. If it were accepted, a plaintiff would never be entitled to recover any costs (save the actual costs of proceedings) incurred by him before the defendant had delivered his defence, because until then the issues were not defined. That

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does not seem to me to be the right view. The question is, in every case, what is the reasonable thing to do, and the Taxing Master is not bound by any such limit of time as is suggested.

For those reasons I think that the learned Taxing Master in his answer to objections correctly stated the law and gave expression to what has been the general practice in these cases. I think he exercised his discretion as to whether the costs incurred were premature or not. It seems to me that that is the only question he had to determine, and in those circumstances I think the objections fail.

The result is, I think, that this appeal should be allowed, and the objections dismissed with costs here and below.

LAWRENCE L.J. I agree. The only objection carried in by the defendants before the Taxing Master in respect of the relevant items, and therefore the only objection open to them on their summons to review, was in these terms: "As there was a stay of proceedings for security for costs and ship's papers the defendants submit that these items were premature." Now that objection was, I think, intended to raise a question of principle—at all events it was so treated by the Taxing Master—and the only question of principle that I myself can extract from that objection is that an order for a stay of proceedings, whether it be pending security for costs or pending delivery of ship's papers, operates not only to stay the proceedings in the action, but also to stay what the Master of the Rolls has aptly described as "the activities" of the parties in getting up their case so that any costs incurred during such stay must necessarily be disallowed.

The Taxing Master has evidently had that question argued before him; his answer shows it. And to my mind it is really the only question of principle that can arise upon the objection as framed, because apart from that question the order for a stay (which like any other relevant fact would be a matter to be taken into consideration) does not make the decision of the Taxing Master that the costs were not premature a decision on a question of principle.

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Mr. Simey was reluctant, when I pressed him on the matter, to say that the order stayed the proceedings in the sense that it prevented the solicitors from looking after the interests of their respective clients during the operation of the stay. All he would say was that when such an order had been made, the Taxing Master was bound to hold that any costs incurred by the parties during the stay were premature and would have to disallow them as a matter of principle. Now I think in that he was wrong. There can be no doubt, I think, that an order staying proceedings does not operate as a stay of the ordinary work of a solicitor in getting up the case. A solicitor must of course be careful in what he does during such a stay, because the Taxing Master would no doubt take the existence of the stay into consideration in coming to a conclusion whether any costs incurred during such stay were premature or not.

That leaves only the question whether in fact these costs were prematurely incurred, and I agree with my colleagues that this is a pure question of discretion for the Taxing Master, and is not open to review in this or any other Court. It is for him to say whether, in the special circumstances of the particular case, the costs are or are not prematurely incurred; and in considering that question he must, and no doubt did, bear in mind the fact that an order to stay proceedings had been made, and all other material factors. The Taxing Master having come to the conclusion that the costs objected to in the present case were not prematurely incurred, in my judgment that finding is not open to review.

I abstain from dealing with the question of the costs incurred before action, not because I differ from my colleagues but because I am not convinced that the Taxing Master has allowed any such costs, and further because no objection to such costs has been carried in before him.

For the reasons stated I agree that this appeal succeeds, and ought to be allowed.

Solicitors: *Thomas Cooper & Co.; Waltons.*

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HARKER *v.* BRITANNIC ASSURANCE COMPANY, LIMITED.

Insurance (Life)—Industrial Life Insurance—Offence—Insurance of Child under Six—Policies assuring Sums aggregating more than Statutory Maximum—Clause in Policies limiting payment to Lawful Maximum—Limitation of Proceedings—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11—*Friendly Societies Act*, 1896 (59 *&* 60 *Vict. c.* 25), *s.* 62—*Industrial Assurance Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 8), *ss.* 4, *sub-s.* 1; 39, *sub-s.* 2—*Friendly Societies Act*, 1924 (14 *&* 15 *Geo.* 5, *c.* 11), *s.* 2, *sub-s.* 1.

Sect. 62 of the Friendly Societies Act, 1896, enacts that a friendly society shall not "insure or pay" on the death of a child under a specified age any sum of money which, added to any amount payable on the death by any other society or branch, exceeds 10*l.* By s. 4, sub-s. 1, of the Industrial Assurance Act, 1923, the above provisions "relating to payments on the death of children," are extended to industrial assurance companies, and by s. 2, sub-s. 1, of the Friendly Societies Act, 1924, it is provided that s. 62 of the Act of 1896 "both as originally enacted and as applied to . . . . industrial assurance companies, shall have effect as if for that section the following section were substituted," that being a section which enacts that such a company shall not "insure or pay" in excess of the above amount.

The respondents, an industrial assurance company, issued three policies of insurance in respect of the life of a child within the meaning of the above provisions, for sums which aggregated more than the statutory maximum, though each was for a sum less than that maximum. Each policy contained a provision that no payment would be made which either alone or in conjunction with other such payments exceeded the statutory maximum. On a charge of having committed an offence within s. 39, sub-s. 2, of the Act of 1923:—

Held (Avory J. dubitante), that the words in s. 4, sub-s. 1, of the Act of 1923 "relating to payments on the death of children" were merely descriptive of the group of sections in the Act of 1896 headed "Payments on death of children" and did not limit those sections in their application to industrial assurance companies to payment only, but included the provisions as to insurance.

Held, also, that the above provision in each policy had no legal effect at all and it could not therefore be contended that in fact the company did not insure for more than the statutory amount.

Held, further, that the proceedings were in time because, for this purpose, the insurance company did not insure from the time only when the policies were taken out, but (per Lord Hewart C.J.) on every occasion when a premium was paid; (per Avory J.) continued to insure during the time that the assured was not in default and the policies were in force.

CASE stated by justices of the West Riding of Yorkshire.

The appellant, Harold Parkinson Harker, at the instance of George Stuart Robertson, the Industrial Assurance Commissioner, on April 13, 1927, preferred an information at Goole petty sessions against the respondents, the Britannic Assurance Company, under s. 39 of the Industrial Assurance Act, 1923 (13 & 14 Geo. 5, c. 8), charging them with unlawfully assuring on October 18, 1926, 15*l.* 10*s.* payable on the death of one Frederick Cowling, a child under the age of six years, which was in excess of the sum of 10*l.*, contrary to s. 4, sub-s. 1, of the above Act, which extended the provisions of s. 62 of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), to industrial assurance, as amended by s. 2, sub-s. 1, of the Friendly Societies Act, 1924 (14 & 15 Geo. 5, c. 11).

On the above date, October 18, 1926, three policies of assurance on the life of the said Frederick Cowling, then under six years of age, were in existence, issued to his mother. Under one of these, dated December 5, 1921, 4*l.* 10*s.* was assured; under the next of the same date, 2*l.*, and under the third, dated August 7, 1922, 9*l.*, making in the aggregate 15*l.* 10*s.* assured. The respondents were an industrial assurance company within s. 1 of the Industrial Assurance Act, 1923, and the premiums were collected weekly by the respondents' collectors. Each of the above policies contained the following clause:—"The provisions of the Act of Parliament enacting that no greater amount than the sum of 6*l.* shall be paid on the death of a child under the age of five years or than the sum of 10*l.* on the death of a child under the age of ten years shall apply to this policy."

It was contended for the respondents that although the statutes prohibited payment in the specified cases they did not prohibit insurance; secondly, that they could not be said to have insured for more than the lawful amount, inasmuch as they could not effectually insure for more than the lawful amount, and had in the above provision in each policy contracted not to do so, and, thirdly, that the proceedings were out of time, by reason of the provisions

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of s. 11 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), enacting that proceedings must be commenced within six months of the matter of complaint arising.

The justices dismissed the information.

Giveen for the appellant. The justices were wrong in dismissing the information. The aggregate of the amount insured by the three policies exceeds the legal maximum of 10*l.*, therefore an offence has been committed, although the amount insured in each policy separately is within the maximum. The clause in the policies limiting the amount payable thereunder is of no effect, and is a mere statement of the law which is being violated. It is in the nature of a trap, inducing insurers to pay unnecessary premiums in return for which they get nothing. With regard to the contention that s. 4, sub-s. 1, of the Industrial Assurance Act, 1923, only extends to industrial assurance companies the provisions of s. 62 of the Friendly Societies Act, 1896, so far as they relate to payments and not so far as they relate to insurances on the death of children, s. 2, sub-s. 1, of the Friendly Societies Act, 1924, clearly enacts that industrial assurance companies "shall not insure or pay" an amount exceeding the prescribed amount.

Comyns Carr K.C. and *Blanco White* for the respondents. The respondents did not commit any offence. Assuming that the combined effect of the Acts of 1896, 1923 and 1924 is to forbid such a transaction as the present, they do not apply, because all the policies were effected before the provisions of the Act of 1896 were applied to industrial assurance. A policy is effected once for all, and is not a new contract each year—per Lord Hatherley L.C. in *In re Anchor Assurance Co.* (1) But those Acts do not in any case affect these transactions. Sect. 62 of the Act of 1896 provides that a friendly society shall not "insure or pay" a sum in excess of the statutory limit; s. 4, sub-s. 1, of the Act of 1923, enacts that the provisions of s. 62 of the Act of 1896 relating to "payments on the death of children"

(1) (1870) L. R. 5 Ch. 632, 638.

shall extend to industrial assurance companies, but does not say that the provisions as to insuring shall apply. The respondents, even if they can be said to have insured in excess of the statutory limit, have not paid any sum in excess thereof.

Sect. 62 of the Act of 1896 applies to societies registered or unregistered, and by s. 106 "registered society" means registered under the Act. Therefore s. 62 as applied to industrial assurance companies by the later Acts applies only to societies registered under the Act of 1896, and unregistered societies. The respondents are not registered under the Act of 1896, nor are they unregistered, for they are registered under the Companies Acts. Therefore the Acts do not apply.

The object of inserting the proviso in each policy was to make its provisions contractual as well as statutory, and the policies could not, therefore, amount to a promise to pay a greater sum than the statute allowed. The reason why payments only are forbidden by s. 4, sub-s. 1, of the Act of 1923 is that although an insurance company cannot protect itself against over-insuring at the time it issues the policy by inquiring if there is any other policy in existence, and cannot know whether or not other policies are issued on the same life so as to make the aggregate exceed the statutory maximum, it can do so at the time of the death, and refrain from paying in excess of that maximum. It is the invariable practice of the respondents to pay the maximum sum allowed and to return all premiums paid in excess of those properly applicable to that sum.

Giveen replied.

Cur. adv. vult.

1928. Jan. 13. The following judgments were read :—

LORD HEWART C.J. This is a case stated by the justices of the West Riding of Yorkshire. The question arises out of an information preferred by Mr. Harold Parkinson Harker, the appellant, at the instance of Mr. George Stuart Robertson, the

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Industrial Assurance Commissioner, against the respondents, the Britannic Assurance Company, Ld., under s. 39 of the Industrial Assurance Act, 1923, charging that the respondents, on October 18, 1926, unlawfully insured the sum of 15*l.* 10*s.* payable on the death of one Frederick Cowling a child under the age of six years, which sum exceeded the sum of 10*l.*, contrary to s. 4 of the Act of 1923, as amended by s. 2 of the Friendly Societies Act, 1924. That information was heard and determined by the justices on April 13, 1927, and they dismissed the information. The question for the Court is whether, in so dismissing the information, the justices came to a correct determination in point of law.

It is not necessary, I think, to recapitulate the facts, which are fully and clearly set out in the case stated. It was established by the evidence that on October 18, 1926, the infant, Frederick Cowling, the son of Adelaide Cowling, was under six years of age; he had, in fact, been born on November 12, 1921, and the effect of the granting of the series of insurance policies upon the life of that infant, which policies are described with particulars and dates in the case stated, was that the total sum, according to the tables in the policies for which the infant was assured on October 18, 1926, was 15*l.* 10*s.* In those circumstances, it was contended on behalf of the present appellant that an offence had been committed. It was contended, on the other hand, by the respondents, the assurance company, that the prohibition in the statutes, although it prohibited payment, did not prohibit insurance; and, secondly, that the company could not be said to have insured for more than was lawfully permitted, because nobody could insure effectively for more than was lawfully permitted, and, finally, in any event, that the proceedings were out of time. The second contention of the assurance company was in these remarkable terms, that, "alternatively, insuring more than the maximum sum was not an offence, because such insuring was forbidden by the section, and therefore it was impossible in law so to insure, and the policy purporting to insure was a mere nullity." The question is whether, in

these circumstances, the information ought to have been dismissed.

It was provided by s. 62 of the Friendly Societies Act, 1896, that a society or branch should not insure or pay on the death of a child under five years of age any sum which, added to any amount payable on the death of that child by any other society or branch, exceeded 6*l.*, or on the death of a child under ten years of age, any sum which, added to any amount payable on the death of that child by any other society or branch, exceeded 10*l.* By s. 4, sub-s. 1, of the Industrial Assurance Act, 1923, the provisions "relating to payments on the death of children" of the said s. 62, inter alia, were extended to industrial assurance companies as if those provisions were therein re-enacted, and in terms made applicable to industrial assurance companies. It was contended on behalf of the respondents that by reason of the words "relating to payments on the death of children" the provisions of the section were extended to industrial assurance companies only in so far as they related to payments, and not in so far as they related to the insurance of children in excess of the prescribed limit. But the statutory heading to ss. 62 to 67 of the Act of 1896 is "Payments on death of children," and, in my opinion, the words "relating to payments on the death of children" in s. 4, sub-s. 1, of the Act of 1923 were merely descriptive of the sections therein referred to, and did not limit those sections in their application to industrial assurance companies. This view is confirmed by the amending s. 2 of the Friendly Societies Act, 1924 (14 & 15 Geo. 5, c. 11). This section, while it alters the amounts for which children may lawfully be insured, again uses the words "shall not insure or pay on the death of a child," and, in express terms, refers to s. 62 of the Act of 1896 as applied to industrial assurance companies. Sect. 39, sub-s. 2, of the Industrial Assurance Act, 1923, provides that any industrial assurance company which contravenes or fails to comply with any of the provisions of the Act shall be guilty of an offence under the Act. It follows that if an industrial assurance company

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insures a child for a sum which exceeds the sum mentioned in s. 2, sub-s. 1, of the Friendly Societies Act, 1924, that is to say, in the case of a child under six years of age 10*l.*, the company is guilty of an offence under the Act of 1923.

But it was argued that the respondent company did not insure the child for a sum in excess of the limit, inasmuch as each of the policies contained a proviso in the following terms: "Provided always that the provisions of the Act of Parliament enacting that no greater amount than the sum of 6*l.* shall be paid on the death of a child under the age of five years or than the sum of 10*l.* on the death of a child under the age of ten years shall apply to this policy." And it was said that, though the sum for which the child was insured according to the tables in the policies was 15*l.* 10*s.*, he was really insured only for 6*l.* in the case of death under the age of five years, or 10*l.* in the case of death between the ages of five and ten years. This proviso, I think, has no legal effect at all. All insurances are necessarily subject to the statutory provisions relating thereto, and the effect of the argument is that, because a company cannot lawfully insure a child for a sum beyond the statutory limit, it commits no offence if it grants such an insurance unlawfully. It is an entertaining argument. It seems to involve the proposition that a person cannot effectively commit an offence which is forbidden by law because the law steps in to prevent his act from being completed, or, at any rate, from remaining undisturbed. Unfortunately the law cannot always prevent the commission of offences. Sometimes it has to punish the offender. In my opinion if a company purports to insure a child for a sum beyond the limit, it commits an offence under the statute, and none the less because it may also be perpetrating a gross fraud upon the assured.

With regard to the contention that the prosecution was out of time, it is sufficient to say that, in my view, the offence of insuring a child for a sum in excess of the lawful amount is committed on every occasion when a premium is paid and received in respect of such an insurance.

For these reasons I think that the appeal should be allowed, and the case be remitted to the justices with a direction to convict.

AVORY J. To establish the offence charged in this case it was necessary to prove: (1.) that an industrial assurance company in insuring a sum exceeding the sum of 10*l.* payable on the death of a child under six years of age is contravening the provisions of the Industrial Assurance Act, 1923; (2.) that the respondents had, in the circumstances, insured a sum exceeding 10*l.* payable on the death of a child under six years of age; (3.) that they had so insured on the date alleged in the information—namely, October 18, 1926.

On behalf of the respondents it was contended: (1.) that s. 4 of the Industrial Assurance Act, 1923, extends to industrial assurance companies so much only of the provisions of s. 62 of the Friendly Societies Act, 1896, as relate to payments on the death of children, as distinguished from insurance; (2.) that, in the circumstances, the respondents had not insured a sum exceeding 10*l.* payable on the death of a child under six years of age; (3.) that they had not insured on October 18, 1926, but on the dates of the policies of insurance in 1921 and 1922, and that the provisions of s. 11 of the Summary Jurisdiction Act, 1848, applied as a bar to the proceedings. As to the first point, in my opinion s. 2, sub-s. 1, of the Friendly Societies Act, 1924, substituting, as it does, the amended section therein enacted for s. 62 of the Act of 1896, both in its application to friendly societies and to industrial assurance companies, removes the difficulty which is suggested to arise from the fact that s. 4 of the Act of 1923, in terms, only extends to industrial assurance companies the provisions of the Act of 1896 relating to payments on the death of children. In other words, the amended and substituted section is to be read as incorporated in s. 4 of the Act of 1923, and any breach of the amended section is a contravention of the Act of 1923. In view of this conclusion, it is not necessary to consider the contention of the appellant that the words "relating to

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payments" in s. 4 of the Act of 1923 are merely descriptive of the group of sections under that heading in the Act of 1896. I am not prepared, as at present advised, to adopt this construction of the section.

On the second point on further consideration I have come to the conclusion that the respondents, having insured the life of the child in question by the terms of the three policies in the sums of 4*l.* 10*s.*, 2*l.* and 9*l.* respectively in the event of its death under six years of age, had insured a sum exceeding 10*l.* on the death of the said child under six years of age, notwithstanding the proviso in each policy that no greater amount than 6*l.* should be paid on the death of the child under five years of age or 10*l.* under ten years. Assuming in the respondents' favour that they only insured the amount which they agreed to pay according to the proviso they would be liable on the three policies in the event of the child dying under six years of age to pay the several sums of 4*l.* 10*s.*, 2*l.* and 6*l.*, making a total of 12*l.* 10*s.*, the limit of 6*l.* applying to each policy separately; but it is at the least open to doubt whether the application by the proviso of the provisions of a statute which were no longer in force in 1926 would have any effect on the liability of the respondents accruing in 1926, and in that view they would have been liable, as the appellant contended, to pay the sum of 15*l.* 10*s.* on the death of the child.

On the third point, the respondents' contention that they insured only on the dates of the policies cannot, I think, be supported. So long as the assured is not in default in the payment of premiums and the policies are in force, the respondents are continuing to insure, and were doing so on October 18, 1926, and the insurance being for a sum exceeding 10*l.* was in breach of the provisions of the section as amended in 1924, and in contravention of the Act of 1923.

For these reasons I think the appeal should be allowed, and the case remitted to the justices to convict.

BRANSON J. I agree. I am satisfied for the reasons given by my Lord that it is an offence for an industrial assurance

company to insure for a sum in excess of the statutory limit allowed for payment, and also that the words "to insure or pay" cover keeping insured, and therefore that the prosecution is not out of time.

The only point upon which I desire to add anything is the question whether the respondents have insured for an amount in excess of the statutory limit. Clearly they have, unless proviso 2 operates contractually (*a*) in the case of the third policy to cut down the amount specified in the policy itself, and (*b*) in the case of each policy to cut down the amount specified therein because of amounts insured by the other policies. Each policy contains a contract by the respondents to pay according to the schedule and the appropriate table; then comes proviso 1, which makes the schedule and the appropriate table part of the contract. Then follows proviso 2. All that it says is that the statutory provisions in question shall apply to the policy. Such a term in a contract can have no legal effect, for the statute operates of its own force and applies to the policy apart from any such term. The respondents seek to discard the natural meaning of the language used, and to contend that the proviso should be construed as meaning that notwithstanding that a certain sum is specified in the table to be payable, it shall not be paid if in the event which happens payment of that amount would be an infraction of the Act. The only ground for this contention of the respondents is that to confine the meaning of the proviso to the plain meaning of the language used would be to render it useless and inoperative. But the contract must be construed, if there is any ambiguity, contra proferentem, and I decline to depart from the plain meaning of the language used in order to enable the company to say that though they have taken premiums under the third policy which according to the table incorporated therein entitled the assured to 9*l.* on the death of the child between four and five, they are only liable to pay 6*l.* The argument is a fortiori when it is sought to use the proviso in each policy to limit the amount apparently payable under it apart from the proviso by reference to amounts payable under other policies.

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I agree, therefore, that this contention of the respondents must also fail, and that the appeal must be allowed.

Appeal allowed.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondents: *Kingsley Wood, Williams & Co., for J. G. Cooper, Birmingham.*

W. L. L. B.

Observations of SCRUTTON, L.J., at p. 785, *applied.* BOLTON *v.* BOLTON. [1949] 2 All E.R. 908.

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Dec. 9, 12, 13.

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Jan. 23.

[IN THE COURT OF APPEAL.]

COLESHILL *v.* LORD MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF MANCHESTER.

[1927. C. 472.]

Negligence—Licensor and Licensee—Housing Scheme—Laying out new Road —Open Trench, unfenced but obvious—"Trap."

The defendants in execution of a housing scheme were laying out a new road running eastwards from a certain highway and closed at its eastern end by a quickset hedge. Footpaths had already been laid out and edged with kerbstones; houses were being built on the northern side and heaps of earth and building materials made the footpath on this side impassable; the footpath on the south side was still unfinished, but was traversable; it was bounded by a fence of wooden posts and bars; the middle of the road was levelled but not metalled; across it, for laying an electric cable, the defendants had cut a trench which they left unfenced and by night unlighted. They did not prevent persons, whether intending occupiers of houses or others, from walking down the new road. The plaintiff on a September evening while there was still daylight walked with a companion down the highway and into the new road along the southern footpath. Through a gap in the fence they went across other land occupied by the defendants to a golf course. They returned somewhat hurriedly when it was growing dark, and the plaintiff fell into the trench and was injured:—

Held, that the trench being apparent to all, there was nothing in the nature of a concealed danger or "trap," and that therefore the defendants were not liable to the plaintiff, who was a mere licensee.

APPEAL from the judgment of Acton J. in an action commenced before Fraser J. and, in the sad event recorded in the judgment of Scrutton L.J., continued before Acton J., and a common jury at the Manchester Assizes.

The plaintiff, a cutlery salesman, brought an action against

the defendants for personal injuries suffered by him through the alleged negligence of the defendants on September 5, 1926, while he was lawfully proceeding along a road known as Shawbrook Road, Levenshulme, in the City of Manchester. He alleged in his particulars of negligence that the defendants had been constructing the road and executing works thereon and had left in the road an excavation uncovered, unfenced and unlighted, of the existence of which they had failed to warn passers by; or that they had neglected to place a barrier across the entrance to the road or otherwise to prevent the public from using it; and further that by these omissions and by building certain dwelling-houses on one side of the road and letting them to tenants they invited the public to pass along the road, which by reason of the excavation was dangerous and constituted a trap.

The defendants pleaded that at the time of the accident the road was in course of construction and had not been dedicated to the public and had not in any way become a public highway; that they never invited the public or the plaintiff as a member of the public to pass along the road; that the road in its then condition was not dangerous and contained nothing in the nature of a trap; that the condition of the road was well known to the plaintiff when he passed down it; and that, if they were guilty of any negligence, which they denied, the plaintiff was guilty of contributory negligence. They also pleaded that the plaintiff was a trespasser and that they owed him no duty to provide for his safety.

Under an agreement with the owner of the land the defendants were carrying out a housing scheme which involved making a new road, Shawbrook Road aforesaid. (1) This road, which it was agreed at the trial was not a public highway, was a cul-de-sac about 260 yards long, at its west end running into a public highway, the Errwood Road, at the east end terminating in a quickset hedge. On the north side of the road the appellants (2) were building houses, none of which were occupied at the time of the accident, though they were

(1) The further statement of the facts is taken from the written judgment of Scrutton L.J.

(2) The defendants in the action.

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sufficiently completed for the tenants to move in a week later. The road itself was 50 feet wide, 24 feet being roadway and the remaining 26 feet being made up of two grass pathways which had been kerbed. On the day of the accident there was a trench across the roadway 2 feet wide and 18 inches deep for laying an electric main to serve a standard lamp. No lights had as yet been installed in the roadway, and at night the trench was unlighted and unfenced. The condition of the pathways a fortnight after the accident was described by the surveyor who gave evidence for the respondent thus: "The footpath on the side on which the houses were built was more or less impassable. There had been an excavation for some sort of main; I think an electric main. . . . . The footpath on the other side, you could walk along it in parts . . . . but a good deal of it was very rough. There were heaps of soil and so forth." The surveyor said it was obviously not a completed road. The father of the plaintiff also said it was obviously not a finished road. Mr. Willoughby, one of the earliest tenants, who knew the road before September 5, said he had never before that date seen vehicles on the road. But parts of the road and footpaths, especially at its entrance to Errwood Road, were level before the accident, though the surface of the road was not finished.

The land on the south of the road was owned by the defendants, though not yet built on. It was divided from the road by a two-barred fence. South of this land again was a golf course which had public footpaths across it, and was apparently a favourite walk of the neighbours, especially on Sundays. At some point of the fence one of its top bars had been broken, so that by stepping over the bottom bar you could get into the field, and people walking through this gap towards the golf links had made a sort of rough footpath. A good many people had taken this short cut, particularly on Sundays, and the defendants, if they knew of it, had done nothing to stop them, though when the houses on the south side of the road were built the short cut would of course be stopped.

The plaintiff was engaged to a young lady, who lived in the neighbourhood, and had on former occasions walked with her on the golf links, reaching them by a public footpath further down Errwood Road. He had never been on the unfinished road in question before, but on this Sunday, seeing some people coming up the grassy short cut, he and the lady walked down the road about 8 o'clock (summer time), a quarter of an hour after sunset. He said: "The road looked quite well to walk on. . . . . I did not notice the road going. I walked on the right hand side of the road," i.e., the footpath. . . . . "We came upon a hole in the footpath"; and then they went through a gap in the fence. He says he did not see the excavation across the road or any earth thrown up from it. In fact, on the given dimensions, over 2 cubic yards of earth must have been thrown up from the excavation somewhere. He stayed about a quarter of an hour on the golf links and came back through the gap in the fence, entering the road after 9 o'clock when it was growing dark. He then fell into the trench and sustained the injuries for which he sued.

In the result Acton J., who had not been referred to any authorities except *Oldham* v. *Sheffield Corporation* (1) and *Murley Brothers* v. *Grove* (2), rejected the submission of the defendants' counsel that there was no case to go to the jury, and framed certain questions, the defendants' counsel not assisting. These questions were apparently based on the *Sheffield Corporation* case (1), and on the lines that the defendants had represented to reasonable persons, by the appearance of the road and by not stopping them, that this was a highway on which they might safely walk, and were not addressed in any way to the position of the plaintiff as a trespasser, bare licensee, or invitee in the sense in which these terms have been used in recent cases. The plaintiff's original contention that the road was a highway was abandoned early in the trial.

The questions and answers were as follows:—

"(1.) Would any reasonable member of the public reasonably

(1) (1927) 136 L. T. 681. (2) (1882) 46 J. P. 360.

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have supposed that he had either the invitation or the permission of the defendants to use the part of the roadway between Errwood Road and the golf links ?—Yes.

(2.) Did the plaintiff so suppose ?—Yes.

(3.) Did the plaintiff, when he entered the said part of the roadway, either (*a*) mean to leave the highway, or (*b*) know that he was leaving the highway ?—No.

(4.) Was the excavation left in a dangerous condition at the time when the plaintiff fell in ?—Yes.

(5.) Was there contributory negligence on the part of the plaintiff ?—No."

Upon these findings the learned judge entered judgment for the plaintiff for 300*l*., the amount of damages agreed between the parties if the plaintiff should get a verdict.

The defendants appealed.

Merriman K.C. and *Laski* for the appellants. The learned judge in the first question has spoken of the " invitation or permission " of the appellants to use Shawbrook Road. But there is no evidence whatever of any invitation, and the only permission is such as may be inferred from the fact that the appellants did not prevent the public, including the plaintiff, from trespassing upon the unfinished roadway. Strictly speaking the respondent was a trespasser and was in the roadway by sufferance and not really by permission. But in any case his rights cannot be put higher than those of a licensee. " A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which without licence, had been unlawful " : *Thomas* v. *Sorrel.* (1) The only right which a licensee has is to find the land free from hidden dangers of which the licensor knows and which the licensee has no reason to suspect. The licensor must not " set a trap " for the licensee, as Willes J. said in *Corby* v. *Hill* (2); but unless there is " something like fraud," as

(1) (1673) Vaugh. 330, 351. (2) (1858) 4 C. B. (N. S.) 556.

was said by the same learned judge in *Gautret* v. *Egerton* (1), the licensor is not liable. To make him liable there must be "an appearance of safety under circumstances cloaking a reality of danger": per Hamilton L.J. in *Latham* v. *Johnson*. (2) If a licensee has been allowed to use a private road the licensor must not place a dangerous object in his way at night without giving him notice: *Corby* v. *Hill*. (3) If a licensee has been allowed to cross a field, the licensor must not introduce a savage horse into the field without notice: *Lowery* v. *Walker*. (4) But without some misrepresentation of safety a licensor is not liable. The licensee "must take the permission with its concomitant conditions, and, it may be, perils": per Williams J. in *Hounsell* v. *Smyth* (5), cited with approval by Hamilton L.J. in *Latham* v. *Johnson*. (6) And this view of the law has been approved by the House of Lords in *Fairman* v. *Perpetual Investment Building Society* (7); *Mersey Docks and Harbour Board* v. *Procter* (8): see especially per Lord Sumner (9), and by the Court of Appeal in *Latham* v. *Johnson* (10) and *Sutcliffe* v. *Clients Investment Co.* (11) The duty which the owner of land owes to persons using a highway crossing or bounding his land differs widely from that of a licensor towards a mere licensee. Consequently cases like *Barnes* v. *Ward* (12) and *Hadley* v. *Taylor* (13) have no application. Nor are those cases relevant in which, as in *McClelland* v. *Manchester Corporation* (14), a local authority in taking over and making up what is already a street have by misfeasance created a danger. Of the two cases cited to the learned judge, in the first, *Oldham* v. *Sheffield Corporation* (15), there was a public highway, then a piece of private land, and then another public highway in the same straight line with the first. The defendants under a contract with the owner of the private

(1) (1867) L. R. 2 C. P. 371, 375.
(2) [1913] 1 K. B. 398, 415.
(3) (1858) 4 C. B. (N. S.) 556.
(4) [1911] A. C. 10.
(5) (1860) 7 C. B. (N. S.) 731, 743.
(6) [1913] 1 K. B. 411.
(7) [1923] A. C. 74.
(8) [1923] A. C. 253.
(9) [1923] A. C. 274–276.
(10) [1913] 1 K. B. 398.
(11) [1924] 2 K. B. 746.
(12) (1850) 9 C. B. 392.
(13) (1865) L. R. 1 C. P. 53.
(14) [1912] 1 K. B. 118.
(15) 136 L. T. 681.

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land took down the fencing which had separated the land from the end of the first highway, and proceeded to connect the two highways by a new piece of road across the private land. A river ran through the private land. The defendants in the course of constructing a bridge across the river had put up a hoarding of no great height to protect and screen this work. A row of street lamps ran along the first highway up to and beyond the former boundary of the private land, and to any one passing down the first highway at night the two highways had the appearance of one continuous road. The plaintiff being deceived by this appearance drove into the hoarding and then into the river and was injured. The defendants were held liable. That case has no application to the present, for first the plaintiff was more than a bare licensee, and secondly the road was a trap to any one driving down it for the first time and at night. Here Shawbrook Road was not a highway and there was nothing in the nature of a trap. The respondent came down Errwood Road. Then he turned to his left and entered Shawbrook Road, which was visibly in course of construction with heaps of earth lying about and a trench cut across it patent and obvious to any one who had the use of his eyesight. He entered this unfinished road while there was still daylight, and either failed to see what was before his eyes, or else saw it and forgot it. This cannot be called a trap. The other case cited to the learned judge, *Murley Brothers* v. *Grove* (1), has no application unless the respondent is to be considered a trespasser, and in that case it strongly supports the appellants. And there are good reasons for holding that the respondent was a trespasser, for a licence to enter the road in the daytime may well exclude any licence to be there after dark. In this view the respondents have the additional support of *Latham* v. *Johnson* (2) and *Hardy* v. *Central London Ry. Co.* (3)

The third question put to the jury is inappropriate in view of the evidence. It assumes that part of Shawbrook Road was a highway and that the respondent was in that part

(1) 46 J. P. 360. (2) [1913] 1 K. B. 398, 411.
(3) [1920] 3 K. B. 459, 473.

before he entered the part which was being constructed. The evidence was that he came down Errwood Road and turned immediately at a right angle into the unfinished road. The fifth question is irrelevant unless the appellants were guilty of a breach of duty. On the facts as proved there is no evidence of any breach, and the learned judge ought to have withdrawn the case from the jury.

Singleton K.C. and *Harold Rhodes* for the respondent. No doubt the duty which the occupier of land owes to a trespasser is less onerous than that which he owes to a licensee.

[SCRUTTON L.J. The Court is of opinion that the respondent was a licensee and not a trespasser.]

Then the verdict and judgment should stand. It would appear from the argument for the appellants that the whole of Shawbrook Road lay east of Errwood Road. That is not the fact. It extended to the west on the other side of Errwood Road and presented the appearance of a public highway in continuation of which the eastern portion, where the accident happened, had been so far constructed—the kerbstones having been laid and the roadway itself levelled—as to lead to the belief that it was open to the public. Thus this case is hardly to be distinguished from *Oldham* v. *Sheffield Corporation.* (1) In the one case there is a highway, in the other the fictitious appearance of a highway; in both cases there is the apparent continuation of a highway leading to a trap. Even if Shawbrook Road was not a highway the liability of the appellants is the same. In the words of Blackburn J. in *Binks* v. *South Yorkshire Ry. Co.* (2): "There may possibly be cases where the owner of land adjoining a way, may by his acts, induce the public to go near to an excavation in his land so as to get into danger; in which case it would be the same thing whether the way were a highway or not." The appearance of the road might not have deceived a person who knew the place well. The respondent was a visitor for the first time. The extent of the plaintiff's knowledge is an important matter in charging the defendant with liability in a case of this kind. "The duty which one

(1) 136 L. T. 681. (2) (1862) 3 B. & S. 244, 254.

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person owes to another to take reasonable care not to cause him hurt by act or omission is relative both to the person injured and the person charged with neglect and the circumstances attending the injury. Among other such circumstances is that of place": per Hamilton L.J. in *Latham* v. *Johnson*. (1) The jury have found that there was no contributory negligence on the part of the respondent, and the question is simply, what duty did the appellants owe him in the circumstances? The duty has been formulated by Bigelow C.J. in *Sweeny* v. *Old Colony and Newport Railroad Co.* (2) in a passage quoted by Beven on Negligence, 3rd ed. (1908), p. 443, and by Kennedy L.J. in *Lowery* v. *Walker* (3): "The true distinction is this: a mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but, if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." (4)

[ATKIN L.J. referred to *Lewis* v. *Ronald*. (5)]

Merriman K.C. in reply. The passage cited from the judgment of Hamilton L.J. in *Latham* v. *Johnson* (6) affords equal support to either of the parties according as the respondent had or had not due warning of the danger. To the same effect is the judgment of Phillimore L.J. in *Norman* v. *Great Western Ry. Co.* (7), commenting on the words "reasonably safe" in the judgment of Fry L.J. in *Simkin* v. *London and North Western Ry. Co.* (8), and concurred in by Pickford L.J. (9) But if the defendant's duty is to be measured not by any objective standard, but by one which varies with the state of mind, the information, or the experience of the person complaining, what degree of care was to be observed for the safety of the respondent, who

(1) [1913] 1 K. B. 398, 410.
(2) (1865) 92 Mass. 368, 374.
(3) [1910] 1 K. B. 198.
(4) This passage does not occur in the 4th edition of Beven (1928).
(5) (1909) 101 L. T. 534.
(6) [1913] 1 K. B. 410.
(7) [1915] 1 K. B. 584, 596.
(8) (1888) 21 Q. B. D. 453, 459.
(9) [1915] 1 K. B. 598.

walked down the road in daylight and who must or ought to have seen the excavation which was obvious to every one? obvious, that is, in the sense in which the word is used by Lord Wrenbury in *Fairman* v. *Perpetual Investment Building Society* (1): "Primarily a thing is for this purpose obvious if a reasonable person, using reasonable care, would have seen it. But this is not exhaustive unless the words 'reasonable care' are properly controlled. There are some things which a reasonable person is entitled to assume, and as to which he is not blameworthy if he does not see them when if he had been on the alert and had looked he could have seen them. For instance: if one step in a staircase or one rung in a ladder has been removed in the course of the day and a man who had used the staircase or the ladder in the morning comes home in the evening finding the staircase or ladder still ostensibly offered for use, and comes up or down it without looking out for that which no one would reasonably expect—namely, that a step or rung has been removed—he has nevertheless suffered from what has generally been called 'a trap,' although if he had stopped and looked he would have seen that the step or rung had been removed. He was not guilty of negligence, he was not bound to look out for such an unexpected danger as that, although if he had proceeded cautiously and looked out it would have been obvious to him."

Cur. adv. vult.

Jan. 23. The following written judgments were delivered:—

SCRUTTON L.J. [after stating the facts, proceeded:] This case was heard under melancholy circumstances. Mr. Justice Fraser, who began the case on Thursday, July 7, and had heard three of the plaintiff's witnesses, was taken ill during the night and died on the Friday. Mr. Justice Acton was sent down from London on the Sunday and, having read Thursday's shorthand notes, at the urgent request of the parties continued the case with the same jury on Monday, the 11th, the Thursday's witnesses not being recalled. I can understand that in the unprecedented and painful circumstances it is

(1) [1923] A. C. 74, 96.

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unnecessary to take any objection to what happened, but I think it is a precedent which should not be followed in future. I doubt whether a judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in Court in the course of the trial before the jury and another judge, it not being a case of evidence being taken on commission or before an examiner.

The somewhat unusual form of the questions put to the jury is explained by the fact that apparently two cases only had been cited to Acton J.—namely, *Oldham* v. *Sheffield Corporation* (1) and *Murley Brothers* v. *Grove*. (2) In *Oldham's* case (1) the plaintiff, driving a motor car along a lighted highway at night, saw in front of him an apparently continuous line of lights, suggesting a continuous highway. In fact there was in the line an unbridged ravine, approached by a private road in course of construction, barred at the end approaching the ravine by an unlighted hoarding. On the other side of the ravine there was a lighted highway, and the Sheffield Corporation were intending to join the two highways by a bridge and dedicate the private road when constructed. Salter J., who tried the case, was faced with the decision in *Murley* v. *Grove* (2), where a driver at night drove into an unlighted trench in an undedicated road connecting two highways, and where the owner of the land was held under no liability to the licensee. He distinguished it on the ground that in *Murley* v. *Grove* (2) the plaintiff, making a short cut from one highway to another, knew that he had left the highway, whereas in *Oldham's* case (1) the plaintiff was misled by the line of lights and absence of warning into thinking he was still on the highway. This seems to explain the form of the first three questions. The first question is rather unfortunate, as there is no "roadway between Errwood Road and the golf course." To reach the golf course you get through a gap in a broken fence over a bar, and proceed through rough grass trodden down by passers until you reach an admitted public footpath. From the plaintiff's point of view he went along the unfinished road for two reasons: (1.) he was going

(1) 136 L. T. 681. (2) 46 J. P. 360.

to the golf course, which he had always previously reached by another route, and saw two people coming up through the grass, so he assumed he could get through; (2.) the beginning of the cul-de-sac road looked finished. From these two facts he seems to have inferred he might go, and seems not to have been dissuaded from going by the facts that, as he walked along, the road was obviously unfinished, containing imperfectly filled up trenches and holes, and that he had to get through and over a broken gap in the fence to get on the way to the links. On the other hand, the case against the defendants is put on the ground that, as they had not stopped in the past people from going along the road and through the fence, they must be taken to have licensed all such people in the future, and so came under an obligation, after they had failed to stop the first trespasser, not to set a trap for the subsequent licensees.

The plaintiff came along the road for the first time in broad daylight, and assuming he had then tumbled into the trench, it is impossible to think he could have succeeded in an action. The danger was an obvious one to any one who used his eyes. It was not set to injure him, but arose in the ordinary course of making and lighting a new road. It was there before ever he used the road. A similar position would arise if in getting over the lower bar of the fence he had stumbled. It would I think have been impossible to say that in daylight that bar in the path was a trap; it was, if you walked straight on, a danger, but an obvious one. It would have made no difference in my view if he had met with an accident at the fence when he returned half an hour later. He knew there was such a bar, and could not complain if he came to grief getting over it in the dark. There remains the question whether he can complain of the trench across the road, which he did not in fact see when he walked along the road, though it was there, and which he fell into when he returned in the dark.

It is clear that the plaintiff's position cannot be put higher than that of a bare licensee. Lord Sumner in *Procter's* case (1)

(1) [1923] A. C. 253, 272.

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distinguished invitee and licensee thus: "In the case of the former, invitor and invitee have a common interest, while, in the latter, licensor and licensee have none." There was clearly no common interest between the plaintiff and the defendants here. If the plaintiff is to be treated as a licensee and not a trespasser because, though he did not know it, other people had not been stopped from doing the same thing, his position as a licensee is thus defined by Lord Sumner in the same case (1): "A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself: if it is one to be expected, he must expect it and take his own precautions. If he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements. As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen. The licensee is to take reasonable care of himself and cannot call a thing a trap, the existence of which a reasonable man would have expected or suspected, so as to guard himself from falling into it." This is only repeating what had been said by Farwell L.J. and himself in *Latham* v. *Johnson* (2): "A licensee takes premises, which he is merely permitted to enter, just as he finds them." When this licensee entered these premises in daylight there was an open trench across the road with thrown up earth heaped round it. The owner of the land "must not expose the licensee to a danger not obvious nor to be expected there under the circumstances." In my opinion it is impossible on the evidence to say that this trench in daylight was not obvious, or that the road was not obviously in daylight an unfinished road, with

(1) [1923] A. C. 274. (2) [1913] 1 K. B. 398, 404, 405, 411.

buildings and road in course of construction and development, and I use "obvious" in the sense in which Lord Wrenbury uses it in *Fairman's* case. (1)

Approaching the case from this point of view, the question at the end of the plaintiff's case appears to be: Is there any evidence on which the jury could reasonably find that the defendants had exposed the plaintiff to a danger not obvious or reasonably to be expected under the circumstances? And having regard to the fact that the plaintiff entered the road in daylight, and that on the evidence of his own witnesses it was obviously an unfinished and unlighted road, I cannot see any evidence on which a jury could find a concealed danger. There appears to me to be nothing in the nature of a representation of a safe highway, such as the continuous line of lights in *Oldham's* case (2); nothing in the nature of an obstacle known by the defendant to be dangerous, but which the plaintiff would reasonably think not dangerous, such as the horse with a tendency to bite mankind in *Lowery's* case. (3) This is enough to dispose of the case, but I desire to add that I am inclined to think that failure to interfere with people walking about in the daytime does not constitute a licence to walk about at night. I also think the question of the obligation of a person who does not stop people from walking on his land to disclose natural defects of which he knows and which the walkers may not know may require further consideration. I doubt whether the owner of a mountain with rock faces, when he knows the rock holds are unstable, is bound to warn every one he sees about to climb that the rocks are not safe; or whether the owner of east coast cliffs, which have an unpleasant habit of sliding down on to the beach, is bound, if he allows summer visitors to walk on his cliffs or beach, to warn every one of the risk of cliffs falling.

For these reasons, I think Acton J. at the end of the plaintiff's case should have withdrawn the case from the jury on the ground that the danger to which the plaintiff

(1) [1923] A. C. 74, 96. (2) 136 L. T. 681.
(3) [1911] A. C. 10.

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was exposed was on his own evidence obvious to a reasonable man, and one reasonably to be expected under the circumstances, and that the plaintiff being at the best a bare licensee (and I doubt if he was that by night), the defendants owed no duty to him in respect to such a danger.

The appeal in my opinion should be allowed, and judgment entered for the defendants with costs here and below.

ATKIN L.J. In this case, the facts of which I need not recapitulate, the jury by their answers appear to have found that the plaintiff was permitted by the defendants to enter the roadway in question; that he was misled by the defendants into assuming that the roadway was an ordinary highway; and that he fell without negligence into a trench dug by the defendants in such highway. Upon these findings the judge has entered judgment for the plaintiff, as I think he was entitled. The question before us is whether there is any evidence to support the jury's findings. I think there was evidence to support the finding that the plaintiff was impliedly permitted to enter the roadway, in other words that he was a licensee; and in the course of the argument we so intimated to counsel. The substantial question is whether there was evidence to support any finding that the defendants misled the plaintiff into believing that the roadway in question was a highway. Apart from such a finding I think it clear that the plaintiff could not recover. This part of the Shawbrook Road was at the time of the accident in the course of being made up into an ordinary road with carriage way and side pavements for the purpose of affording access to houses which had been built or were to be built on either side of it; its exact condition I will consider presently; but it had not been completed, still less dedicated to the public; none of the houses abutting on it had been occupied, and it was in fact still the private property of the defendants. The plaintiff therefore met with his accident while traversing as a licensee the property of the defendants; and it is clear that with certain qualifications he has to pass over the property as it is and takes the risk of such dangers

as he finds on it. It is no doubt unfortunate that the law as to the obligation of owners of property towards those who come upon it compels distinctions to be drawn which are subtle and apt to be confused. On the other hand they correspond to real differences in the nature of the user of property and in the reasonable claims to protection of those who are permitted such use. As to the rights of bare licensees I find three recent authorities which appear to afford safe guidance. In *Latham* v. *Johnson* (1) Hamilton L.J. says: "The rule as to licensees, too, is that they must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they run the risk of them. In darkness where they cannot see whether there is danger or not, if they will walk they walk at their peril: *Gautret* v. *Egerton* (2); *Lewis* v. *Ronald* (3); and see generally *Indermaur* v. *Dames* (4); *Collis* v. *Selden* (5); *Holmes* v. *North Eastern Ry. Co.* (6); *Batchelor* v. *Fortescue.* (7) Where 'the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint. . . . . One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be, perils': per Williams J. in *Hounsell* v. *Smyth* (8); and see *Wilkinson* v. *Fairrie* (9); *Binks* v. *South Yorkshire Ry. Co.* (10); and *Hardcastle* v. *South Yorkshire Ry. Co.* (11) 'The licensee or visitor must take care of himself, in using the premises as he finds them; . . . . he is not entitled to be protected from the existing risks of the premises, in their ordinary state, by the care of the owner': per Pigot C.B. in *Sullivan* v. *Waters.* (12) Again Scotch law is the same. 'When a person uses by permission private property where a pond or other dangerous excavation exists, he must take the benefit of the use subject to the risk which attends it': per

(1) [1913] 1 K. B. 398, 411.
(2) L. R. 2 C. P. 371.
(3) 101 L. T. 534.
(4) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.
(5) (1868) L. R. 3 C. P. 495.
(6) (1869) L. R. 4 Ex. 254.
(7) (1883) 11 Q. B. D. 474.
(8) 7 C. B. (N. S.) 731, 743.
(9) (1862) 1 H. & C. 633.
(10) 3 B. & S. 244; 32 L. J. (Q. B.) 26.
(11) (1859) 28 L. J. (Ex.) 139.
(12) (1864) 14 Ir. C. L. R. 460, 469.

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Lord Shand, *Prentice* v. *Assets Co.* (1) and *Ross* v. *Keith.* (2)" In *Hayward* v. *Drury Lane Theatre and Moss' Empires* (3) Scrutton L.J. says: "A bare or mere licensee, one who has no common interest with the owner of the premises but is there by the owner's permission, takes the premises as he finds them, with all their dangers and traps, a trap being a danger which a person who does not know the premises could not avoid by reasonable care and skill. The owner is under no liability as to existing traps unless he intentionally set them for the licensee, but must not create new traps without taking precautions to protect licensees against them: see the judgment of Willes J. in *Gautret* v. *Egerton*" (4); and later on (5) he says: "The difference between the bare licensee and the invitee or licensee with an interest is that as to existing traps the owner incurs liability to the latter and not to the former." In *Mersey Docks and Harbour Board* v. *Procter* (6) Lord Sumner uses the words which have been read by Scrutton L.J. and which I need not repeat.

Taking these passages as guides one has to consider whether there is any evidence that the defendants in this case omitted to act with reasonable diligence to prevent their premises from misleading or entrapping the plaintiff. It is true that the word "entrapping" is not unambiguous, and that there are dicta which appear to extend the obligation of the owner beyond what I should consider the ordinary meaning of an obligation to avoid entrapping. For instance I find that Lord Halsbury in *Lowery* v. *Walker* (7) says: "If he has acquiesced in their doing so" (i.e., crossing his ground) "he is bound to take the ordinary precautions to prevent persons going into a dangerous place where he knows they are going, and going by his acquiescence without notice or warning or any form of security to prevent the injury happening which did happen." I think this statement must be read in relation to the actual decision, which was that the owner of a field could not with impunity place in the field an animal which

(1) (1889) 17 R. 484, 489.
(2) (1888) 16 R. 86.
(3) [1917] 2 K. B. 899, 913.
(4) L. R. 2 C. P. 371.
(5) [1917] 2 K. B. 914.
(6) [1923] A. C. 274.
(7) [1911] A. C. 10, 14.

he knew to be dangerous or likely to injure those whom he permitted to use the field; in other words could not create a special danger directed to his licensees or set a trap for them. In ordinary circumstances I cannot reconcile the statement with the undoubted law that a licensee must take dangerous premises as he finds them.

Preferring therefore the statements of the law which I have above set out, and asking myself the question just propounded, I have come to the conclusion that there is no evidence of an omission by the defendants to act with reasonable diligence not to mislead or entrap the plaintiff. It is clear from the evidence that the ground in question presented the ordinary appearances of a building estate under construction, including the uncompleted road to serve the houses. On the north side the margin of the road between the actual roadway and the curtilage of the houses was impassable by reason of building materials, heaps of earth and longitudinal trenches; on the south side the margin could be used for walking, as it was by the plaintiff and his friend on passing to the golf links. But there were obstructions in it; and a hole possibly made for a lamp-post, which they had to avoid by walking on the kerb. The actual roadway was not completed; it had not had its final surface put on; the actual surface, though smooth towards the edges, was rougher in the centre. It was kerbed for part of its length, and it had a large trench right across it 2 feet wide and 18 inches deep. The houses at the far end were still being built. I cannot find any evidence that the defendants by their conduct led the plaintiff to believe that it was anything other than what it was, an uncompleted road, part of an uncompleted building scheme. The trench across was in daylight an obvious danger, and cogent proof of incompletion. It is true that the plaintiff did not notice it as he passed up in daylight, and may well have omitted to notice it without negligence. But it was there to be seen, an obvious advertisement of the road's condition, and the defendants can hardly be blamed because the plaintiff, even without negligence, omitted to see what was plain to be seen. If the

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defendants could not be held to blame if the plaintiff had fallen into the pit when he passed up the road in daylight, as I think is the case, I do not see how they can be blamed because he fell into the pit on returning in the dusk. They held out no more extensive invitation, and made no further representation, in dusk than in light. The premises were on the evidence obviously premises where building and construction was in the process of being carried on, and it was over such premises in such a condition that the plaintiff was permitted passage. What were the defendants to do? Were they to light the whole of the road or to fence or light the trench across the road? If so, why not the trenches alongside the road, or the hole which the plaintiff found on the south side? I think that there was no evidence upon which the jury could find that the defendants by their conduct led the plaintiff to believe that he would be travelling over an unobstructed roadway, still less that it was part of a highway. In these circumstances the defendants have been guilty of no wrong, and the verdict and judgment must be set aside and judgment entered for the defendants.

EVE J. On the evening of Sunday, September 5, 1926, the plaintiff fell into an excavation upon land belonging to and occupied by the defendants at Levenshulme, in the county of Lancaster, and sustained a compound fracture of his left leg. He alleged that the accident was due to negligence or breach of duty on the part of the defendants, and by this action claims to recover damages from them. The defendants admit the plaintiff's injuries, but they deny that they were guilty of any negligence or breach of duty.

The material facts are that on the evening in question, the plaintiff, accompanied by a young lady, started for a stroll in the direction of the golf links situate in the vicinity of the defendants' land, and having proceeded along a highway known as Errwood Road to a point where there was a road—theretofore unknown to the plaintiff, but which appeared to him to lead towards the golf links—turned off the highway on to this road and proceeded along it in the

direction of the golf links. Walking a short distance along the southern and right hand side of this road, the pair passed on to the links through a gap in the fence dividing the road from the links, and after a short interval of time returned through the same gap on to the road, and in the increasing darkness hurried back along the middle of the road in the direction of Errwood Road on their way home. About midway between the spot where they passed from the links on to the road and Errwood Road, a trench had been dug across the whole breadth of the road—some 24 feet long and 2 feet deep—and the injury to the plaintiff was caused by his falling into this trench.

The road was and is the property of the defendants, and the trench had been dug for lighting purposes connected with the development of their adjoining land as a residential estate. The road is not a highway, it ends in a cul-de-sac, and is described in the evidence of the surveyor called by the plaintiff as "a road in process of construction on an estate in process of construction—an uncompleted road—something going to be a road when the top surface was on—obviously not an adopted road—obviously not a highway, an unadopted road, by which I mean the road surface and footpaths were not completed." Building operations were in progress along the north side and the footpath on that side was more or less impassable in consequence of such operations. The footpath on the southern side was not so incumbered. Part of it had been levelled, part was rough, and as the plaintiff and his companion passed along on their outward journey on that side, they came upon an excavation in the footpath, to avoid which they had to step aside on to the kerbstones and so pass it in safety. The kerbstones were laid on both sides for some distance up the road.

The allegations of negligence on the part of the defendants on which the plaintiff bases his claim are neglect to place a barrier across, or to fence off the entrance to, the road; to light or affix lamps or danger signals to the entrance, or to have a watchman in attendance to prevent the public from passing along the road. By reason of these omissions

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and by letting to tenants some of the houses already built on the estate, he maintains that the defendants invited the public to use and pass along the road when the same was in fact dangerous, and constituted a trap by reason of the transverse excavation. There had been no actual letting of any of the houses at that time, and in my opinion there was no evidence to support the allegation that the public were invited to make use of the road. It is true they were not warned to keep off it, nor was there any physical barrier to keep them from entering upon it, but its appearance and condition and the work in progress along the northern frontage must have brought home to the mind of any person of ordinary intelligence, and possessing reasonable powers of observation, its true characteristics as a road in course of construction and serviceable in the main for the purposes of the estate development. That the public did in fact use it and without any protest on the part of the defendants, was proved, more particularly on Saturdays and Sundays, when, for the purposes of recreation, they passed by this route to and from the open country lying beyond the houses in course of building, but in so doing they were no more than licensees of the defendants, and it is upon the basis of this relationship that the liability of the defendants as owners and occupiers of the road to the plaintiff has to be ascertained. The extent of that liability is, I think, determined by the extracts which have been read from the judgments in *Latham* v. *Johnson* (1) and *Fairman's* case. (2) The grant of the licence creates no right, it merely affords an answer to a charge of trespass, it is a mere permission, and those who take it must take it with all chances of meeting with accidents; but the licensor, although not bound to make the premises safe for the use of the licensee, is bound to warn him of any concealed danger which he knows to be existing on the premises at the date of the licence, or subsequently created. A concealed danger is one which is not known to the licensee or obvious to the licensee using reasonable care. I think the law on this point is accurately

(1) [1913] 1 K. B. 398. (2) [1923] A. C. 74.

summed up in the passage I am about to read from the 6th edition (1924) of Sir John Salmond's book on Torts. At p. 439 he says: "Even if the licensee does not actually know of the danger, he has no cause of action if the danger was so visible, obvious, or usual on that class of premises that a licensee using due care for his own safety would have discovered it for himself before coming to any harm. Against such dangers the occupier is not bound to warn his licensee. The licensee can recover only if he can prove that the occupier led him into a trap by permitting him to enter on premises which, using due care on his own part, he reasonably supposed to be safe." Can it properly be said that the existence of this trench was a concealed danger to any one using reasonable care, and in the nature of a trap? The plaintiff, possibly with a mind otherwise preoccupied, says that he did not notice it when they passed up the road, nor did he notice that the road was in process of construction, or see any building material about. His companion noticed earth in the middle of the road. Accepting these statements as true, it is still impossible to regard this danger as a concealed one, or otherwise than as an obvious one to any one passing along the road or using reasonable care.

There was, in my opinion, no failure on the part of the defendants in any duty owing by them to the plaintiff, who voluntarily elected to take the risk of returning in the growing darkness along a road, the character and condition of which he had had full opportunity of observing some hour or more before in the daylight, and in which, be it remembered, he certainly knew there lurked the one source of danger which he and his companion had avoided on their way up.

I do not think there was any case to leave to the jury, and the appeal ought, in my opinion, to be allowed.

Appeal allowed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for P. M. Heath, Manchester.*

Solicitors for respondent: *Slater, Heelis & Co., Manchester, for William Johnston & Co., Stockport.*

W. H. G.

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Oct. 24, 25, 26; *Nov.* 29.

[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* BELILIOS AND OTHERS.

Revenue—Estate Duty—Succession Duty—Property situate out of United Kingdom—Foreign Disposition—Will to take Effect according to Foreign Law—Testator and Beneficiaries domiciled Abroad—Appointment of Trustees resident in England—Proceedings in English Courts—Establishment of Trust in England—Succession Duty Act, 1853 (16 *&* 17 *Vict. c.* 51), *s.* 2—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 2.

By his will, which was made in English form and was dated October 1, 1883, a testator, who declared that the instrument was to take effect (so far as the case admitted) according to the law of Hong Kong, where he was domiciled, devised and bequeathed his property, which was situate out of the United Kingdom, to trustees on trust to invest a sum to produce a certain annuity to his wife, to pay certain legacies and to stand possessed of the residue to pay the annual income thereof to his sons or son during their or his lives or life and on the death of the last survivor of his sons in trust for his son's children.

The testator died on November 11, 1905, domiciled in Hong Kong, where his will was proved by the tenant for life, who was the only son of the testator living at his death and alone of the trustees acted in the trusts.

In 1911 the tenant for life wished to borrow money and, at the request of the lenders, he appointed, in this country, four new trustees of the will, three of whom were resident in England. Between 1913 and 1922, owing to the tenant for life's dealings with the trust funds, proceedings in the Chancery Division were instituted and orders were made in connection with the administration of the trusts of the will. On October 17, 1922, the tenant for life died, leaving him surviving his widow and two infant sons, who were domiciled in Hong Kong, but had been made wards of Court by virtue of the proceedings in the Chancery Division and the orders made therein. The trust property, so far as was material, was situate abroad. Rowlatt J. held that estate duty was payable on the infants' succession but succession duty was not.

On appeal, as to estate duty:—

Held, that the succession of the infants to the testator's residuary estate was at the testator's death in 1905 a succession by virtue of Hong Kong law and to Hong Kong property; that it had never lost that character or fallen within s. 2 of the Succession Duty Act, 1853; and, therefore, that the property was not liable to estate duty, under s. 2, sub-s. 2, of the Finance Act, 1894.

Dictum of Lord Cranworth L.C. in *Wallace* v. *Attorney-General* (1865) L. R. 1 Ch. 1 applied.

Attorney-General v. *Campbell* (1872) L. R. 5 H. L. 524; *Attorney-General* v. *Jewish Colonization Association* [1901] 1 K. B. 123 distinguished.

Dictum of Bacon V.-C. in *Thompson* v. *Birch* [1876] W. N. 177; Hanson's Death Duties, 7th ed., p. 393 overruled.
Decision of Rowlatt J. [1927] 2 K. B. 439 on this point reversed.

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APPEAL from a decision of Rowlatt J. (1) on an information filed by the Attorney-General on behalf of His Majesty.

By his will dated October 1, 1883, the testator, Emanuel Raphael Belilios, revoked all wills and testamentary dispositions theretofore made by him, and declared that to be his last will and testament, which (except so far as was thereinafter mentioned) was to take effect (so far as the case admitted) according to the law of the colony of Hong Kong, where he was and intended to remain domiciled. After divers specific and pecuniary bequests, and after revoking the trusts of two settlements dated June 14, 1872, and March 4, 1878, to the extent therein mentioned, the testator reappointed the settled property therein comprised to trustees on certain trusts during the lives of the testator's children and the life of the last survivor of them, and on the death of the last survivor on trust for sale and investment of the proceeds of sale in the names or under the legal control of his trustees in certain specified securities with power to vary. The testator devised all the messuages, lands, tenements, hereditaments and real estate of every tenure, including chattels real, of or to which he should at his death be seised, possessed, or entitled, or over which he should at his death have a general power of appointment or disposition by will (except what he otherwise disposed of by his will or any codicil thereto) to trustees on trust, with power to postpone, that they should sell the same. The testator further bequeathed all the money, securities for money, goods, chattels, credits and personal estate of or to which he should die possessed or entitled or over which he should at his death have a general power of appointment or disposition by will (except chattels real and except what else he otherwise disposed of by his will or any codicil thereto) to his trustees on trust, with power to postpone, that they should call in, sell and convert into money such parts thereof as should not consist of money and out

(1) [1927] 2 K. B. 439.

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of the moneys to arise from the sale of the real estate thereinbefore devised and from the calling in, sale and conversion into money of such parts of the personal estate as should not consist of money and out of his ready money pay his debts, funeral and testamentary expenses and legacies, and out of the residue invest sums to produce an annuity of $12,000 to his wife, Sema Belilios, and annuities to his mother and his brothers and sisters. The testator then proceeded to make provision for payment of certain sums out of the proceeds of sale and conversion of his real and personal estate to each of his sons living at his death or born in due time afterwards who should attain the age of twenty-one years or marry under that age, and to each of his daughters living at his death or born in due time afterwards who should attain the age of twenty-one years or marry under that age with consent. Subject as aforesaid the testator declared that his trustees should stand possessed of the residue of the moneys arising from the sale of the real estate thereinbefore devised in trust for sale and from the calling in, sale and conversion into money of such parts of his personal estate thereinbefore bequeathed as should not consist of money and of the ready money of or to which he should die possessed or entitled on trust to invest the same in the names or under the legal control of his trustees in or upon any of the authorized stocks, funds, shares or securities and to pay the annual income thereof to all or any the sons or son of the testator during their or his lives or life who should have attained or should attain the age of twenty-one years, and if more than one in equal shares, and the testator declared that on the death of the last survivor of his sons his trustees should stand possessed of his residuary trust funds in trust for all or any the children or child living at the death of the testator or born afterwards of his sons and who, being sons or a son, should have attained or should attain the age of twenty-one years, or being daughters or a daughter, should have attained or should attain that age, or should have married, or should marry under that age with consent. The will contained power for the trustees after the death of the survivor of the testator's

sons to raise and apply any part or parts not exceeding in the whole one-half part of the then expectant presumptive or vested share in the residuary trust funds of any child of any of the testator's sons under the trusts thereinbefore declared for his or her advancement or benefit and to apply the whole or such part as they should think fit of the annual income of the share or fortune to which any child of any of the testator's sons should for the time being be entitled in expectancy under the trusts thereinbefore declared for or towards his or her maintenance or education.

The testator declared that if, after the death of the survivor of his sons, no child or children of all or any the testator's sons should live to attain a vested interest, or vested interests, in the testator's residuary trust funds, then his trustees should stand possessed of the testator's residuary trust funds and the income thereof on the trusts and with and under and subject to the powers, provisions and declarations hereinafter declared (being certain trusts for the purchase of freehold ground and premises within a radius of three miles from Government House, Calcutta, to form and found thereon such a free college for the education of the children, both male and female, of the Jewish community of Calcutta as in the will more particularly defined), after which event the will was to take effect according to the law of the Empire of India so far as the case admitted.

By his will and by a codicil dated April 20, 1892, the testator appointed certain persons, and also his son Raphael Emanuel Belilios, on his attaining the age of twenty-five years, as the trustees, executrix and executors of his will. By a second codicil dated December 13, 1899, the testator appointed an additional trustee and executor of his will. The testator died domiciled in the colony of Hong Kong on November 11, 1905, where his will and the two codicils were, on May 15, 1906, duly proved by Raphael Emanuel Belilios alone, he being the only son of the testator living at his death, power being reserved to the testator's widow to prove, the other persons named as executors having renounced probate. The grant of probate was duly sealed in this

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country on November 5, 1906. Of the persons named in the will and codicils as trustees Raphael Emanuel Belilios alone acted in the trusts.

The testator died possessed in this country of certain leasehold premises and furniture and a balance at his bankers the value whereof was exceeded by the amount of the debts due from the testator to persons resident in England, so that no estate duty became payable in respect of such property in this country. The testator also died possessed of immovable property in Hong Kong and net personalty, then valued at $2,424,688 of Hong Kong currency (exceeding 250,000*l.*), on which probate duty amounting to $72,741 (7634*l.*) was paid in that colony.

Before 1911 Raphael Emanuel Belilios got into financial difficulties, and wanted to borrow money on the security of his interest under the will. The proposed lenders stipulated that English trustees should be appointed. As a result, by a deed of appointment dated May 4, 1911, and made between Raphael Emanuel Belilios, therein described as of Deane Lodge, Ash Green, in the county of Surrey, barrister-at-law, of the one part; the defendant, Vera Carlotta Belilios, of Deane Lodge, aforesaid, the wife of Raphael Emanuel Belilios; the defendant, Richard Owen Roberts, of No. 1 The Cloisters, Temple, in the City of London, barrister-at-law; Ernest Samuel Halford, of 93 Chancery Lane, in the City of London, gentleman; and the defendant, Edward Elvy Robb, of Temple Chambers, in the City of London, solicitor (thereinafter called the "new trustees") of the other part. Raphael Emanuel Belilios, in exercise of the power for that purpose vested in him by virtue of the will and of the Ordnance or other law of Hong Kong in that behalf and of every or any other power enabling him in that behalf, appointed himself and the defendants to be trustees in the place of the testator's renouncing trustees, and to act jointly with him as the trustees within the meaning of the will and codicils. Raphael Emanuel Belilios also declared that all and singular the hereditaments, chattels and property, whether real or personal, wheresoever situate, including things in action and the right to receive

and recover the same, which were then subject to the trusts of the will and codicils and were capable of being vested by that declaration under the local law affecting the same, should vest in himself and the new trustees for all the estate and interest therein subject to the trusts of the will and codicils. The indenture was in fact executed in this country by all the parties thereto, all of whom, except Raphael Emanuel Belilios and his wife, the defendant Vera Carlotta Belilios, were permanently resident here. Raphael Emanuel Belilios resided in England for some periods down to the date of his death during a visit to this country on October 17, 1922, but neither he nor his wife ever acquired an English domicil. There were issue of the marriage of Raphael Emanuel Belilios and the defendant, Vera Carlotta Belilios, two children and no more—namely, Lionel Emanuel Raphael Belilios, who was born on October 31, 1905, and Nigel Edward Richard David Belilios, who was born on April 6, 1909—who had always lived in this country since their birth.

On April 7, 1913, October 11, 1915, and June 17, 1918, the defendants, in view of dealings with the trust funds by Raphael Emanuel Belilios, began certain actions in the Chancery Division by originating summonses against Raphael Emanuel Belilios, his infant son and other parties asking for directions in connection with sundry questions which had arisen, in the administration of the trusts of the will and codicils of the testator, and the Court made orders in those actions.

On December 17, 1920, Ernest Samuel Halford retired from the trusteeship.

On October 17, 1922, Raphael Emanuel Belilios died leaving him surviving his widow, the defendant, Vera Carlotta Belilios, and his two infant children, who, the Attorney-General claimed (but the defendants denied), had been made wards of Court by virtue of the proceedings in the Chancery Division and the orders made therein. After the death of Raphael Emanuel Belilios the Court made orders in the last of the actions in relation to the education and temporary removal of the infants outside the jurisdiction, and authorizing the expenditure as an advancement of 39,809*l.* 10*s.* 10*d.* on a

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residence for them in Sussex, for which 43,199*l.* 8*s.* 8*d.* was in fact raised and applied.

At the date of the death of Raphael Emanuel Belilios the residuary estate of the testator consisted of (*a*) a sum of 1300*l.* or thereabouts in a bank in the United Kingdom; (*b*) 15,555 fully paid shares of $15 each in the Hong Kong, Canton and Macao Steamship Co., Ld., 534 shares of $10 in the Hong Kong Dairy Farms and Ice Storage Co., Ld., which were then registered abroad in the names of the trustees of the testator's will, but were subsequently sold by the defendants and realized 66,246*l.* 15*s.* 7*d.* net, and 10 shares in the Bank of China and Japan, Ld., in liquidation; and (*c*) certain unsold immovable property situate in the colony of Hong Kong, which was subject to the trust for sale in the will contained.

The Attorney-General claimed that: (1.) at the date of the death of Raphael Emanuel Belilios the will of the testator was for the purposes of the Succession Duty Act, 1853, an English settlement in that the trust funds and property, although for the most part situate abroad, were vested in trustees who were all resident within the United Kingdom and subject to the jurisdiction of the High Court of Justice, whose wards the infants had become by virtue of the orders referred to; (2.) upon the death of Raphael Emanuel Belilios the whole of the residuary estate, except so much thereof as was required to provide for payment of the annuity of $12,000 bequeathed to the testator's widow, passed within the meaning of the Finance Act, 1894, and the infants became beneficially entitled thereto in equal shares contingently on attaining their respective ages of twenty-one, and such beneficial interests constituted a succession within the meaning of s. 2 of the Succession Duty Act, 1853, on which succession duty became payable at the rate of 1 per cent. by virtue of that Act and of s. 58, sub-s. 2, of the Finance (1909–10) Act, 1910, and s. 24 of the Finance Act, 1925; (3.) the defendants as such trustees were accountable for such succession duty in respect of the sums of 39,809*l.* 10*s.* 10*d.* or 43,199*l.* 8*s.* 8*d.*, or other the sum or sums from time to time paid or applied by them to or

for the maintenance, advancement or benefit of the infants; (4.) estate duty at the appropriate rate in respect of so much of the residuary estate as so passed became payable by virtue of s. 2, sub-s. 2, of the Finance Act, 1894, and the defendants were accountable for such duty.

The Attorney-General on behalf of His Majesty accordingly prayed: (1.) That it might be declared that, on the death of Raphael Emanuel Belilios, succession duty at the rate of 1 per cent. became payable in respect of the successions of the infants respectively to the whole of the residuary estate, wherever situate, except such part thereof as was required to provide for payment of the annuity of $12,000 to the testator's widow, Sema Belilios, and that the defendants, as trustees, were accountable for such duty in respect of the sum of 43,199*l.* 8*s.* 8*d.*, or other the sum or sums from time to time paid or applied by them to or for the maintenance, advancement or benefit of the infants respectively; (2.) that it might be declared that on the death of Raphael Emanuel Belilios estate duty became payable at the appropriate rate under the provisions of the Finance Act, 1894, on the whole of the residuary estate of the testator, wherever situate, except such part thereof as was required to provide for the payment of the annuity of $12,000 to the testator's widow, Sema Belilios.

By their answer, the defendants contended that they were not liable to pay the succession duty or the estate duty claimed on the grounds: (1.) That no duty was payable on the death of Raphael Emanuel Belilios in respect of any part of the residuary estate; (2.) that the testator's will at no time constituted an English settlement, but was in form and in substance a settlement subject only to the law of Hong Kong, and that no person entitled thereunder to any benefit might or would become so entitled by virtue of English law; (3.) that none of the property in respect of which the claim of the Commissioners was made passed on the death of Raphael Emanuel Belilios, nor by virtue of the Finance Act, 1894, or any other Act, was to be deemed to have so passed, or to be included in any such Act.

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Rowlatt J. held that s. 2 of the Succession Duty Act, 1853, applied to a disposition of property under a trust established in this country as the result of a foreign disposition in the administration of which trust the English Courts might have to apply foreign law, and that as the trust in the present case was established in England, estate duty was payable by s. 2, sub-s. 2, of the Finance Act, 1894, on the residuary estate, except such part as was necessary to be provided for the payment of the annuity to the testator's widow.

He further held that succession duty was not payable, since s. 24 of the Finance Act, 1925 (which provides that for the purposes of succession duty the succession shall be deemed to arise on the happening of the death by reason of which the successor becomes entitled), was not retrospective.

The defendants appealed as to the payment of estate duty. The appeal was heard on October 24, 25 and 26, 1927.

Maugham K.C., *Latter K.C.* and *J. Israel* for the appellants. The present appeal relates only to the question whether estate duty is payable under s. 2, sub-s. 2, of the Finance Act, 1894, on the interests taken by the infants in the testator's residuary estate situate in Hong Kong. Under s. 1 of that Act estate duty is payable in respect of all property, real or personal, settled or not settled, which passes on the death of a person dying after the commencement of that Act, and by s. 2, sub-s. 2, property passing on the death of the deceased which is situate out of the United Kingdom is only included if, under the law in force before the passing of that Act legacy or succession duty is payable in respect thereof. The property in the present case being situate in Hong Kong, it is necessary to see whether succession duty would have been payable in respect of it under the law in force before 1894. To ascertain what that law was reference must be made to the Succession Duty Act, 1853, which by s. 2 provides that "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after" 1853,

"either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after" 1853 "to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession,'" and by s. 10 provides that succession duty at varying rates shall be levied in respect of every succession.

A "succession" once created cannot be destroyed except by a distribution of the property. Here the infants acquired a succession to the property on the death of the testator in 1905, and as the property is situate abroad estate duty is only payable on it under s. 2, sub-s. 2, of the Act of 1894, if succession duty would have been payable under s. 2 of the Succession Duty Act, 1853.

Some limitation must be placed on the very wide terms of s. 2 of the Act of 1853, and that limitation, it is submitted, is the one put upon them by Lord Cranworth in *Wallace* v. *Attorney-General* (1)—namely, that the successor must be a person who becomes entitled "by virtue of the laws of this country." That test is still in force and is good law. Here the succession was by virtue of Hong Kong law, and it never lost that character and therefore never fell within s. 2 of the Act of 1853.

Attorney-General v. *Campbell* (2) is distinguishable. There what was done was done by the testator himself. The fund was invested in English consols in the names of English trustees, and the testator himself directed that a British trust should be constituted.

To ascertain whether or not the settlement is a foreign one regard must be had to the circumstances existing at the time of the testator's death.

The appellants raise no objection to the decision in *In re Smith's Trusts.* (3)

(1) L. R. 1 Ch. 1, 7. (2) L. R. 5 H. L. 524.
(3) (1864) 12 W. R. 933.

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The statement of Bacon V.-C. in *Thompson* v. *Birch* (1), that in order to make duty attach it is sufficient that the fund be established in this country, "no matter by what means," is a mere dictum, and is not binding on this Court and ought not to be followed.

In *In re Cigala's Settlement Trusts* (2) does not in any way depart from anything that was said by Lord Cranworth in *Wallace* v. *Attorney-General.* (3) There there was an undoubted English settlement, and the beneficiaries under it would have had to claim under English law.

Sect. 2 of the Succession Duty Act, 1853, was construed in *Lord Wolverton* v. *Attorney-General.* (4) The House of Lords there held that when once the will had established a settlement there was an end of the matter. Here the succession came into existence on the death of the testator in 1905. A succession having once been created the successor cannot create a fresh one. Here if there was a succession it must have been at the date of the testator's death. This, however, was a Hong Kong settlement, and under the Hong Kong law there was no succession.

In *Harding* v. *Commissioners of Stamps for Queensland* (5) it was stated that the soundness of the principle laid down by Lord Cranworth in *Wallace* v. *Attorney-General* (3), that the test of liability under the Succession Duty Act was whether the person claiming becomes entitled by virtue of the laws of this country, was one the soundness of which had never been impugned. In *Attorney-General* v. *Jewish Colonization Association* (6) it was held that the settlement was an English settlement, and that the title to the beneficial interest was to be enforced by English law.

All that is here submitted is that in order to make a person liable as a successor within the Act of 1853 he must be a person who becomes entitled by English law. Where once an English settlement has been established nothing done can

(1) [1876] W. N. 177; Hanson on Death Duties, 7th ed., p. 393.
(2) (1878) 7 Ch. D. 351, 354, 356.
(3) L. R. 1 Ch. 1.
(4) [1898] A. C. 535.
(5) [1898] A. C. 769, 773, 774.
(6) [1901] 1 K. B. 123.

make it cease to be so: *Duke of Northumberland* v. *Attorney-General.* (1) The converse is also true that where once a foreign settlement is established nothing subsequently done can make it cease to be so.

Attorney-General v. *Johnson* (2) was the case of a testator domiciled in England dealing with property situate abroad.

[LORD HANWORTH M.R. I should have thought that was a very plain case.]

In *Wallace* v. *Attorney-General* (3) Lord Cranworth L.J. was sitting as a Court of Appeal from a decision of the Master of the Rolls. His decision is therefore a decision of the Court of Appeal, and as such binding upon this Court: see also *Toronto General Trusts Corporation* v. *The King* (4), in which the present Lord Chancellor adopts the test laid down by Lord Cranworth in *Wallace* v. *Attorney-General.* (3) It is submitted therefore that this Court ought to adopt that test.

[LAWRENCE L.J. I see that *Wallace* v. *Attorney-General* (3) was cited with approval by Lord Atkinson in *Winans* v. *Attorney-General.* (5)]

Lord Advocate v. *Macalister* (6) also shows that the succession in this case arose on the death of the testator. The appellants here are not entitled by English law.

[LAWRENCE L.J. *Lambe* v. *Manuel* (7) raises your point very neatly.]

It is said that English law is the same as Hong Kong law, but that is immaterial. The testator has said that Hong Kong law is to apply. For the present purpose, it is to be submitted, Hong Kong law is to be treated as foreign law. The succession here was created on the death of the testator, and can only be enforced by the laws of Hong Kong. In order to succeed the Crown must show that there has been a fresh disposition of the property. It is idle to suggest that there has been a fresh disposition merely because there has been a new appointment of English trustees. The

(1) [1905] A. C. 406, 409.
(2) [1907] 2 K. B. 885.
(3) L. R. 1 Ch. 1.
(4) [1919] A. C. 679.
(5) [1910] A. C. 27, 33.
(6) [1924] A. C. 586, 591.
(7) [1903] A. C. 68.

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Crown have to show that by some means the trust has become an English trust. Take the opposite case. Suppose there is an English trust, and foreign trustees are appointed and applications are made with reference to it to a foreign Court, the trust would not thereby be made a foreign trust.

[They also referred to Dicey's Conflict of Laws, 4th ed., p. 767.]

Sir Douglas Hogg A.-G. and *Beebee* for the Crown. We do not dispute the test laid down by Lord Cranworth as to liability to succession duty. The question is whether the construction placed upon his language by the appellants is consistent with the decisions in subsequent cases. The words of s. 2 of the Act of 1853 are wide enough to cover the present case, but it is admitted that some limitation must be placed upon them. It is clear that the statement in *Harding* v. *Commissioners of Stamps for Queensland* (1) as to the test proposed by Lord Cranworth cannot have been intended to be an exhaustive statement of the law. An Englishman over here could not escape liability for succession duty by making a will in French form and stating that it was to be construed according to French law.

[SARGANT L.J. That would still be an English will.]

Here we have British trustees administering the fund. Whether the will compels trustees to set up an English trust or empowers them to do so is immaterial. As to the discussion of *Thompson* v. *Birch* (2) in the last edition of Hanson on Death Duties (3), it is obvious that the passage there quoted is taken from a shorthand note of what Bacon V.-C. actually said. Having decided that the legacy duty was not payable because of the foreign domicil of the testator the learned Vice-Chancellor took the view that the fund was established in this country, "no matter by what means," and that succession duty applied to it directly.

[SARGANT L.J. That is merely obiter.]

In re Cigala's Settlement Trusts (4) was a case in which an English lady had married an Italian. The funds settled were

(1) [1898] A. C. 769, 774.
(2) [1876] W. N. 177.
(3) 7th ed. p. 393.
(4) 7 Ch. D. 351.

foreign funds. The children entitled were Italian. It was there held that the true test was whether the funds were in the hands of the English trustees in such a manner that the children could not get them from the trustees without bringing an action in the English Courts. The test was not the nationality of the lady when she made the settlement. The case shows that it is not true to say that you cannot tax foreigners.

It is submitted that s. 2 of the Act of 1853 is an all-embracing section, and that persons seeking to escape from it must show special circumstances to take them out of it. Although the language is all-embracing yet no doubt some limitation must be imposed upon it. The question therefore is, what is the true limitation? It is said you must take Lord Cranworth's test—namely, does the person claim under or by virtue of English law? The difficulty is not got over by saying that the trust is an English trust. *Attorney-General* v. *Jewish Colonization Association* (1) was the case of a foreigner settling by deed foreign property, but the trustees were an English corporation. The Court therefore to which the beneficiaries would have to resort would be an English Court. Collins L.J. (2) there thought that the case fell within *In re Cigala's Settlement Trusts* (3), and that what you had to ascertain was whether an English character was stamped upon the property. The case shows that the test is: Is the property in the hands of English trustees, and must the persons claiming it resort to the English Courts for the purpose of enforcing the rights given them by the document in question? In the present case English trustees were appointed in order to give the beneficiaries the protection of the English Courts against the tenant for life of the fund.

Although the property here was real estate in Hong Kong, yet as it is subject to a trust for sale it is to be regarded in the eye of the law as personalty. The cestui que trusts were resident here, and were wards of Court at the time. The relevant date for determining whether the document was an

(1) [1901] 1 K. B. 123. (2) [1901] 1 K. B. 136.
(3) 7 Ch. D. 351.

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English settlement is, it is submitted, 1922. *Toronto General Trusts Corporation* v. *The King* (1) does not afford assistance in the present case. The Court was there considering the locality of a specialty debt.

In re Badart's Trusts (2) was a similar case to *Attorney-General* v. *Campbell*. (3)

[They also referred to Succession Duty Act, 1853, ss. 1, 10, 20, 41; *Attorney-General* v. *Chambres*. (4)]

Maugham K.C. in reply. The mere fact that the trustees of a settlement are in this country is not sufficient in itself to attract succession duty or to affect the construction of the Act. The Court of Chancery has always accepted jurisdiction to act in personam against trustees in this country. Order XI., r. 1 (*d*), refers to trusts which "ought to be executed according to the law of England." But the present disposition operates according to the law of Hong Kong. Neither Lord Hatherley nor Lord Westbury in *Attorney-General* v. *Campbell* (3) relied on the test suggested, whether the trustees were in this country. To uphold such a test would be to introduce extraordinary complications with regard to our self-governing colonies.

[He also referred to *Thomson* v. *Advocate General*. (5)]

Cur. adv. vult.

Nov. 29. The following written judgments were delivered :—

LORD HANWORTH M.R. This is an appeal from Rowlatt J., who on June 17 gave judgment upon this information in favour of the Crown.

The relevant facts are few and not disputed. The testator, Emanuel Raphael Belilios, late of Victoria in the colony of Hong Kong, made his will dated October 1, 1883. By it, after making provision for his wife, he left his property, which included both real and personal property in Hong Kong, to his son for life, and then to his children. The information states that the testator declared that the will

(1) [1919] A. C. 679, 685.
(2) (1870) L. R. 10 Eq. 288.
(3) L. R. 5 H. L. 524.
(4) [1921] 1 K. B. 173.
(5) (1845) 12 Cl. & F. 1.

so far as the case admitted—with an exception thereinafter mentioned—was to take effect according to the law of Hong Kong.

The testator died domiciled in that colony on November 11, 1905, and probate of his will with two codicils was granted there to his son on May 15, 1906. The son, Raphael Emanuel Belilios, who was domiciled at Hong Kong, died on October 17, 1922, in the United Kingdom. At his death the beneficial interest in the estate of which he had been tenant for life passed under the dispositions of the testator to the two infant sons of Raphael Emanuel Belilios. That estate consisted of: (*a*) Some 1300*l.* in the bank in the United Kingdom; (*b*) shares in Hong Kong companies which realized 66,246*l.* 15*s.* 7*d.*, and also some other shares; (*c*) some immovable property situate in the colony of Hong Kong.

Between the deaths of the testator and his son a number of applications had been made to the Chancery Courts here, and new trustees, domiciled and resident in the United Kingdom, had been appointed. No question arises as to the property in the United Kingdom which passes under the testator's will; but the appellants contend that the Crown are not entitled to be paid succession duty on the death of the son in 1922, in respect of what may be called the Hong Kong property. Probate duty amounting to 7634*l.* was paid on that in the colony. The Crown contend that succession duty under s. 2 of the Act of 1853 and likewise estate duty—which they admit rests on the same footing—are payable upon all the property passing on the death of the son in 1922, on the ground that: "At the date of the death of the said Raphael Emanuel Belilios the will of the said testator was for the purposes of the Succession Duty Act, 1853, an English settlement in that the trust funds and property, although for the most part situate abroad, were vested in trustees who were all resident within the United Kingdom and subject to the jurisdiction of the High Court of Justice, whose wards the said infants had become and then were by virtue of the orders hereinbefore referred to."

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The question, therefore, to be decided is whether what was undoubtedly, so to speak, a foreign settlement in 1905 has now become a settlement subject to succession duty. For the appellants it is argued that the wide words of s. 2, which would in their terms cover any property wherever situate—even belonging to a non-resident foreigner—must be governed by some limitation, and that it is limited to the succession to property of those who become entitled to it by the laws of this country.

The Attorney-General, contra, argues that a disposition—even if originally foreign—may come within the Act, if there are British elements attached to, or concerning it, so that British law is invoked, as was done in the present case. When a British forum is involved, and its aid invited, he claims that that gives a different effect to the disposition, which may, and ought in the present case, to be held to fall within the section.

The section opens with the words: "Every past or future disposition of property . . . . and every devolution by law of any beneficial interest in property, or the income thereof." Lord Cranworth L.C. had to consider these wide words in *Wallace* v. *Attorney-General*. (1) He rejects the suggestion that where a person domiciled abroad makes a will giving personal property in this country by way of legacy, the legatee is a person becoming entitled within s. 2; and he states his opinion: "I think that in order to be brought within that section, he must be a person who becomes entitled by virtue of the laws of this country."

Those words appear to me to be supported, and not challenged by, or mistrusted in, the judgment of Lord Westbury in *Attorney-General* v. *Campbell*. (2) Lord Westbury does not doubt Lord Cranworth's decision, for he points out the "extraordinary conclusion" that was contended for—namely, that under the will of a man dying domiciled abroad the first legatee, though not liable to legacy duty, became liable to succession duty under the Act. Then he deals with the case before him, in which, under the direction of the

(1) L. R. 1 Ch. 1, 7. (2) L. R. 5 H. L. 524, 530, 531.

terms of the will, a trust in this country had been created, and he points out that the character of the ownership was determined under the trusts directed to be created by the will.

The reasoning of the Master of the Rolls in *In re Cigala's Settlement Trusts* (1) does not in my judgment run contrary to the above decisions. Applying the tests used by Sir George Jessel to the present case, the settlement in the present case is the testator's will; a settlement by, and upon persons who were foreigners to the law of this country, of property which was situate in that other country. If so, it remains a Hong Kong settlement and succession. "I am unable to find in the Act any warrant for the view that a succession once created can, by the act of the successor, cease to exist and another succession be substituted for it," said Lord Herschell in *Lord Wolverton* v. *Attorney-General* (2); unless, however, by a direction such as was found in *Attorney-General* v. *Campbell* (3), there was a trust created subject to a different jurisdiction.

The words of Lord Cranworth are accepted in the judgment in *Harding* v. *Commissioners of Stamps for Queensland.* (4) That judgment includes the great authority of Lord Watson and Lord Davey.

Finally Lord Macnaghten, giving the judgment of Lords Halsbury, Davey, Robertson and Lindley, as well as of himself, in *Lambe* v. *Manuel* (5), repeats the approval of *Wallace* v. *Attorney-General.* (6) It is also, I think, clear that the date when the character of the succession becomes attached to it is at the moment when the succession is conferred: "the date of the entitlement," as Lord Cave calls it in *Lord Advocate* v. *Macalister.* (7)

It seems, therefore, that 1905 is the dominant date to decide the nature of the settlement and of the succession. If so, this succession was foreign. What has happened to bring the succession or any trust relating to it within this jurisdiction?

(1) 7 Ch. D. 351.
(2) [1898] A. C. 535, 548.
(3) L. R. 5 H. L. 524.
(4) [1898] A. C. 769, 774.
(5) [1903] A. C. 68.
(6) L. R. 1 Ch. 1.
(7) [1924] A. C. 586, 591.

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The facts of the present case do not bring it within the decision of *Attorney-General* v. *Campbell*. (1)

Stirling L.J., in his exhaustive review of the cases in *Attorney-General* v. *Jewish Colonization Association* (2), appears to hold that the question whether any property comes within the purview of s. 2 of the Succession Duty Act, 1853, depends upon the facts and circumstances of each case. "Weighing all these circumstances as best I can, I think that there is nevertheless a preponderance in favour of the view that, inasmuch as the settlement in question is an English settlement, the property in question is under the legal control of an English corporation, and the proper forum for the administration of the trusts relating to the property is an English Court, the case is fairly brought within the purview of the Succession Duty Act, 1853."

The tests he applies are: (1.) According to what law was the operative settlement made? (2.) Where was the legal control? (3.) What forum had cognizance of the trusts?

Stirling L.J. does not suggest that the principle formulated by Lord Cranworth is incorrect, though he holds that his rule must be taken to be satisfied where property is found to be legally vested in a person subject to the jurisdiction of the English Courts, and the title to the beneficial interest in that property is regulated and capable of being enforced by the law of England. (3) These words must, I think, be estimated in relation to the facts of the case that he was considering, and not antagonistically to those of Lord Cranworth in *Wallace's* case (4), for he quotes the statement of the ratio decidendi of *Attorney-General* v. *Campbell* (1) as given by Lord Westbury, which is not inconsistent with Lord Cranworth's proposition. I will not transcribe it; but the crucial part of it appears to be in the words: "The character of the ownership is no longer that of a legacy. The character of the ownership is under the trusts directed to be created by the will": see *Attorney-General* v. *Jewish Colonization Association*. (5)

(1) L. R. 5 H. L. 524, 530.
(2) [1901] 1 K. B. 123, 146.
(3) [1901] 1 K. B. 142.
(4) L. R. 1 Ch. 1.
(5) [1901] 1 K. B. 123, 140.

Now in the present case there was no appropriation of any part of the property so as to make it English property or to alter the character of the original disposition. The ownership passed in 1922 under the testator's will. The Hong Kong Courts would have had jurisdiction to secure that the disposition was effective to the successors on the son's death in 1922. It seems wrong to neglect this root of title, and to set aside the fundamental facts upon which the devolution of the property depends.

No doubt in the *Jewish Colonization* case (1) there were strong facts to justify the decision, a deed in English form and language, to an English company with a registered office in London. The root of the disposition had been transplanted to London. But in the present case Hong Kong cannot be lost sight of. The preponderance lies in favour of the view that the settlement retained its original characteristics.

In re Badart's Trusts (2) is an illustration of an appropriated sum which became liable to succession duty under the particular circumstances of the case, and it was distinguished from *Wallace's* case. (3)

There is in my judgment in the present case no such separation or other facts as to involve the notional removal to this country of the property passing, or any part of it, in respect of which succession and estate duties are now claimed, and thus the conclusion must be reached that the duty is not payable. It is notable that in *Toronto General Trusts Corporation* v. *The King* (4) the present Lord Chancellor treats the principle indicated by Lord Cranworth in *Wallace's* case (3) as a test as to the limitation of the imposition of succession duty, and adopts it.

Rowlatt J. appears to have found himself bound by *Thompson* v. *Birch* (5), and quotes the words of Bacon V.-C. as to a fund established in this Court, "no matter by what means." I am not sure that I appreciate those words. But the authorities to which I have referred all strongly support

(1) [1901] 1 K. B. 123.
(2) L. R. 10 Eq. 288.
(3) L. R. 1 Ch. 1.
(4) [1919] A. C. 679, 685.
(5) [1876] W. N. 177; Hanson's Death Duties, 7th ed., p. 393.

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the principle laid down by Lord Cranworth, and I cannot accept *Thompson* v. *Birch* (1) if it does otherwise.

For these reasons I am of opinion that the claim of the Crown to estate duty fails.

The appeal will be allowed with costs and the information discharged with costs.

SARGANT L.J. The question under appeal here—namely, whether estate duty is payable on the general residuary estate of the testator—admittedly depends on whether succession duty would have been payable thereon under s. 2 of the Succession Duty Act, 1853. That section uses language of the widest character, sufficient on its bare terms to include a succession arising under any disposition, British or foreign, and in respect of any property, real or personal, wherever situate. It would, for instance, include a succession under the will of a domiciled American to real estate in the City of New York. Some implied limitation must therefore be read into the words of the section for the purposes of reasonable construction. We have here to ascertain the extent of this implied limitation to see whether or not it prevents the application of the section to the succession now in question. There have, of course, been a good many decided cases in relation to the section, but none which is quite on all fours with the present case.

The succession in the present case is in relation to real estate in the colony of Hong Kong, and to personal property situate in the same colony, together representing the residuary trust estate of a testator who died domiciled in that colony in the year 1905. The will and two codicils of that testator gave this residuary estate upon trusts, in the events which happened, for the testator's son Raphael Emanuel Belilios during his life, and after his death upon trust for his two sons. The executors and trustees named in the will and codicils were four in number—namely, the testator's widow, the testator's son, and the respective managers for the time being in Hong Kong of two English banking companies—

(1) [1876] W. N. 177; Hanson's Death Duties, 7th ed., p. 393.

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but the only one of these four persons who actually proved the will and acted in the trusts thereof was the testator's son. The will was couched in terms familiar to English lawyers and, I should think, equally familiar to lawyers in Hong Kong. It was proved in Hong Kong, and on a subsequent appointment of trustees in the year 1911 by the testator's son he purported to act under the laws of that colony.

The testator's son, Raphael Emanuel Belilios, who remained domiciled in Hong Kong during the whole of his life, died on October 17, 1922, and it is on the occurrence of that event that duty is claimed to have become payable, on the ground that the beneficial interest then accruing to the two infant sons of the tenant for life constituted a succession within the meaning of s. 2 of the Succession Duty Act, 1853. This claim is resisted on the ground that this succession to property in Hong Kong under the laws of that colony did not on the testator's death constitute a succession within the meaning of the Act of 1853, and that nothing has occurred since sufficient to bring it within that Act.

The first case which defined the extent of the limitation which must undoubtedly be placed on s. 2 of the Act of 1853 is that of *Wallace* v. *Attorney-General*. (1) There Lord Cranworth L.C. said that in order to come within the section the successor must become entitled by virtue of the laws of this country. It is argued for the Crown that subsequent decisions show that his limitation was too broad; and it is no doubt the case that in subsequent judgments the test adopted by Lord Cranworth has not been always applied in the precise terms employed by him. But I do not think that his language has ever been disapproved or, indeed, adversely criticized. And, in the cases in which the Courts have since had to consider whether the documents in question created a taxable succession, I think that the various indications on which they have relied have almost always been indications as to the law under which the succession arises, and that the question so often put as to whether the documents form an English settlement is substantially the same as

(1) L. R. 1 Ch. 1.

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Lord Cranworth's test. And, further, it is to be noted that the test suggested in *Wallace* v. *Attorney-General* (1) has been adopted in two comparatively recent cases of high authority: *Winans* v. *Attorney-General* (2); *Toronto General Trusts Corporation* v. *The King*. (3)

It has indeed been argued for the Crown that the important case of *Attorney-General* v. *Campbell* (4) shook the general authority of *Wallace* v. *Attorney-General* (1), and has shown that a succession originating under foreign law—in that case Portuguese law—may be taxable under the Act of 1853. But, in my judgment, the case when carefully examined does not conflict at all with Lord Cranworth's judgment. In *Attorney-General* v. *Campbell* (4) the trust in question was not constituted by the Portuguese will itself, but was a trust created under English law, though by virtue of a direction in a Portuguese will that it should be so constituted. The distinction lies in the difference between executory and executed dispositions. The dispositions in the Portuguese will as to the annuity fund in question were purely executory; they would naturally, in the first instance, be construed under that law, and no doubt were valid under that law since they were in fact carried out. But they were so carried out in accordance with their precise terms by the constitution of a new and separate English trust. And it was in relation to the succession created by this English trust that the question of duty arose. In my view the language both of Lord Hatherley and Lord Westbury in allowing the claim for succession duty shows that this was the ratio decidendi.

The same considerations seem to me to account for the decision in *Attorney-General* v. *Jewish Colonization Association*. (5) Neither in this case nor in *Attorney-General* v. *Campbell* (4) would it be necessary, as the learned judge suggests, for the Court to apply foreign law for the purposes of administration. In each case there is found a duly

(1) L. R. 1 Ch. 1.
(2) [1910] A. C. 27.
(3) [1919] A. C. 679.
(4) L. R. 5 H. L. 524.
(5) [1901] 1 K. B. 123.

constituted English trust to be administered as such, though the origin of the constitution of the trust has been foreign.

In *In re Cigala's Setlement Trusts* (1) an English lady on her marriage with an Italian gentleman settled both English and Italian property by a settlement in English form and with English trustees. This was held to create a taxable succession. The decision entirely satisfied Lord Cranworth's test. The successor obviously became entitled under English law to the beneficial interest devolving on him in either class of property. In *Attorney-General* v. *Johnson* (2) the succession held taxable was in property in Assam remaining unsold, but the succession was created by an English will devising the property to English trustees upon trust to sell and hold for beneficiaries here. The law creating and governing the trust was English.

In re Smith's Trusts (3) was it seems concerned with a resettlement effected by the whole of the beneficiaries under an original settlement. A succession under this resettlement was held taxable. The case is obviously analogous to that of *Attorney-General* v. *Campbell*. (4) The effective document was the resettlement.

In the present case Rowlatt J. has felt the force of the taxpayer's contention that the decision in *Attorney-General* v. *Campbell* (4) depended on the fact of a new trust having being created in this country under English law; but he has held himself precluded from adopting this view by what he describes as a ruling of Bacon V.-C. in *Thompson* v. *Birch*. (5) But, when this case is examined, it appears that the Vice-Chancellor's remarks were not in the nature of a decision (his decision was on a different point, and was subsequently reversed), but were merely an obiter expression of opinion as to what duty would become payable on a future event. I think that Rowlatt J. attached too much importance to this dictum even in relation to its effect in a Court of first instance; in this Court, at any rate, it is open to review, and

(1) 7 Ch. D. 351.
(2) [1907] 2 K. B. 885.
(3) 12 W. R. 933.
(4) L. R. 5 H. L. 524.
(5) [1876] W. N. 177; Hanson's Death Duties, 7th ed., p. 393.

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it is, in my opinion, contrary to the general line of authority on this subject, and is wrong.

It is important to observe that under the Act of 1853 a succession is constituted, if at all, immediately on the death of the testator, and not on the death of the tenant for life, or other limited owner, on whose death the successor becomes entitled in possession; and the succession duty attaches immediately on the earlier event, and is merely postponed as to payment till the later event. The consequence is that the ultimate incidence of the tax cannot be avoided by any intermediate dealing. It has, however, been contended on behalf of the Crown that the converse does not follow; and that, although in this case this Hong Kong will by a Hong Kong testator of Hong Kong property may not have created on his death a taxable succession in the hands of his two grandsons, it does not follow that intermediate events between the death of the testator and that of the tenant for life may not have rendered this succession a taxable one under the Act, even although during the whole period the two grandsons may have been infants.

Assuming, though without deciding, that such a result may be possible, what are the events on which the Crown relies as effecting this change? They are set out in the information, and are of two kinds. First, there is the indenture of May 4, 1911, under which the sole acting trustee and tenant for life, Raphael Emanuel Belilios, appointed as trustees in his stead four new trustees all resident in England. And, secondly, there are a number of orders made in the Chancery Division in this country on successive applications by the continuing trustees of the testator's will, by which certain proposed arrangements were approved in relation to the execution of the trusts of the will.

As regards the first point, I cannot think that a change in the personnel of the trustees of the will, effected as it was under the Hong Kong law, and in the necessary absence of any consent on the part of the infants, can have any effect in changing the nature or incidents of their succession, though the result was that for some time all the trustees were resident

in this country, and that after a subsequent appointment in which Raphael Emanuel Belilios resumed his character of trustee, the majority of the trustees were so resident.

As regards the second point, not only was no general order ever made here for the administration of the trusts of the will, a step which the Chancery Division here would, I think, have felt great difficulty in making, having regard to the local situation of the trust and the great bulk of the trust property, but the orders that were made went little, if at all, beyond the giving of advice to trustees here as to the steps it would be reasonable for them to take in the carrying out of a colonial trust constituted on lines similar to well known forms of trust in this country. Indeed, I doubt whether, strictly speaking, the Chancery Division here could make orders as to execution of the trusts of the testator's will, which would have the same binding effect in the colony of Hong Kong as orders to the like effect made here; though the orders here would no doubt have a great practical effect should the bona fides of the trustees, or the propriety of their conduct, ever be questioned in proceedings in the Courts of Hong Kong. And, further, the infancy of the two grandsons until after the death of their father, Raphael Emanuel Belilios, negatives any suggestion of a consent on their part to a change in the character of their succession as a consequence of these proceedings. Mr. Beebee, who specially relied for the Crown on the change that had been effected, was asked to lay his finger on the particular transaction from which, and the particular point of time at which, the crucial change in the infants' succession occurred. The best answer he could give was to point to the indenture of appointment of May 4, 1911. There was no single one of the orders made by the Court which he was able to indicate as being conclusive for his purpose.

In my judgment the succession of the infants to the testator's residue was at the testator's death a succession by virtue of colonial law and to colonial property, and has never lost that character or fallen within s. 2 of the Act of 1853. I agree, therefore, that the appeal should be allowed with costs here and below.

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LAWRENCE L.J. On this appeal the appellants rely upon the test laid down by Lord Cranworth in *Wallace* v. *Attorney-General* (1) as to the limitation on the imposition of succession duty under the Succession Duty Act, 1853, and maintain that they are not accountable for any duty under that Act, on the ground that the infant beneficiaries do not claim title by virtue of the laws of this country.

The Attorney-General did not challenge the general correctness of the test laid down by Lord Cranworth, which in my judgment must be treated as firmly established (see, amongst other cases, *Lambe* v. *Manuel* (2) and *Toronto General Trusts Corporation* v. *The King* (3)), but he strenuously denied that, in the special circumstances of this case, the application of that test, when correctly interpreted, led to the result contended for by the appellants.

The disposition which is alleged to have conferred a succession within the meaning of s. 2 of the Act is the will of a testator who died domiciled in the colony of Hong Kong in the year 1905 possessed of movable and immovable property locally situate in that colony. It is not suggested that this will, when it first became operative on the death of the testator, constituted a disposition conferring a succession within the meaning of the section as interpreted by Lord Cranworth, but the Attorney-General contended that, by reason of certain events which had happened before the death of the tenant for life in the year 1922, it had been brought within the section and had become what has conveniently been called an " English settlement," that is to say, a disposition conferring a succession within the Act.

The case made for the Crown was that the crucial date when to ascertain whether the will was an English settlement or not was the death of the tenant for life, at which date it was alleged by the Crown that the facts were as follows : the trustees, in whom the legal title to the trust property was vested, were resident in England ; the English Courts had exercised jurisdiction in matters relating to the execution of

(1) L. R. 1 Ch. 1. (2) [1903] A. C. 68.
(3) [1919] A. C. 679.

the trusts of the will, in particular by giving directions as to the realization of the trust property; the interests taken by the infant beneficiaries under the will were English choses in action, and the infant beneficiaries were wards of an English Court.

The case so made raises, first, the broad question whether a disposition, outside the Act when made, can by the subsequent manipulation of the parties interested under it be brought within the Act, and, secondly, if that question be answered in the affirmative, the further question whether the events relied upon by the Crown have had the effect of bringing the present will within the Act.

Sect. 2 of the Act, so far as material, provides that every disposition by reason whereof a person becomes beneficially entitled to any property upon the death of any person, whether immediately or after an interval either certainly or contingently and either originally or by way of substitutive limitation, is deemed to confer on the person becoming entitled by reason of such disposition a "succession," and the term "successor" denotes the person so entitled, and the term "predecessor" denotes the testator or other person from whom the interest of the successor is derived; s. 10 imposes the duty on every such "succession"; s. 20 makes the duty payable on the "successor" becoming entitled in possession to the "succession"; and s. 42 makes the duty a first charge on the "succession." The provisions of these sections make it clear that a succession within the Act is established once and for all at the moment of time when the disposition is made and first becomes operative; at that moment the succession is deemed to be conferred on the successors, and from that moment the duty is imposed and the charge attaches. That this is the true effect of the Act is well established and not open to doubt: see per Lord Herschell in *Lord Wolverton* v. *Attorney-General* (1) and per Viscount Cave in *Lord Advocate* v. *Macalister*. (2)

According to the scheme of the Act it would seem that the only date for ascertaining whether a disposition conferring

(1) [1898] A. C. 535, 548. (2) [1924] A. C. 586, 591.

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a succession within the Act has been effected is the date when the disposition is made.

It is also well settled that when a succession within the Act has once been established no manipulation of the parties afterwards can get rid of it, and if authority be needed for that proposition it is to be found in the emphatic statement to that effect made by Lord Halsbury in *Duke of Northumberland* v. *Attorney-General*. (1) Mr. Maugham, with great force and much reason, contended that the corollary to that proposition is that where a disposition does not establish a succession within the Act when it is made, no manipulation of the parties afterwards (short of acts amounting to the creation of a new disposition) can establish such a succession.

The Crown, whilst not disputing that a succession once established cannot be got rid of by the parties, contended that the converse does not hold good, and further that Lord Cranworth's test, when interpreted in the light of the subsequent decisions, cannot be taken as having laid down the broad principle contended for by Mr. Maugham. In my opinion the authorities relied upon by counsel for the Crown do not support their contentions nor do any of the authorities cited qualify or shake the test laid down by Lord Cranworth. The relevant cases have been fully dealt with in the judgments of the other members of this Court. I will therefore content myself with stating shortly the reasons why, in my opinion, those most strongly relied upon do not establish the contentions of the Crown or govern the decision in the present case.

Attorney-General v. *Campbell* (2) and *Attorney-General* v. *Jewish Colonization Association* (3) are cases where trusts were established in England by, or by the direction of, persons domiciled abroad, which trusts when established in this country constituted English settlements from the time of such establishment, and consequently came within the Act. As in each of these cases the trust derived its origin from the directions given by a person domiciled abroad the validity

(1) [1905] A. C. 406, 409. (2) L. R. 5 H. L. 524.
(3) [1901] 1 K. B. 123.

of the directions so given no doubt depended upon the law of the domicil of the person giving them, but that fact did not prevent the establishment of the trust in England, when actually effected, from being held to constitute an English settlement, under which the beneficiaries claimed title by virtue of the laws of England.

In re Cigala's Settlement Trusts (1) and *Attorney-General* v. *Johnson* (2) are cases where the trusts were established by persons domiciled in England and were English settlements from the moment when they were made, therefore constituting dispositions under which the beneficiaries claimed title by virtue of the laws of England.

In none of the cases which I have mentioned so far was there any question, such as has arisen here, of a trust effectively established abroad, and therefore not constituting an English settlement when first established, having subsequently been brought within the Act by the manipulation of the parties interested under it.

The two cases next referred to are nearer the present case.

In re Smith's Trusts (3) was a case where all the parties entitled under a will of a testator domiciled abroad executed a deed in England appointing new trustees and declaring trusts of the fund (which apparently had been brought to England) identical with the trusts of the will, and Stuart V.-C. held that succession duty was payable. The reasons for the decision of the learned Vice-Chancellor are not reported, but I think that that case must have been decided on the ground that the beneficiaries claimed title not under the will but under the English deed, and consequently that the latter constituted a disposition conferring a succession within the Act. If the beneficiaries were treated as claiming title under the will, the decision is, in my opinion, inconsistent with Lord Cranworth's test, and must be treated as overruled by *Wallace's Case.* (4)

Thompson v. *Birch* (5) contains a dictum by Bacon V.-C., which was relied upon by Rowlatt J. and has been much

(1) 7 Ch. D. 351.
(2) [1907] 2 K. B. 885.
(3) 12 W. R. 933.
(4) L. R. 1 Ch. 1.
(5) [1876] W. N. 177; Hanson's Death Duties, 7th ed., p. 393.

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relied upon by counsel for the Crown in this Court. In that case the main point was whether the testator was domiciled in America or in the United Kingdom. The testator there had appointed English trustees and his American executors had remitted the proceeds of the testator's property (consisting of American shares) to the English trustees, who had paid such proceeds into Court in an action commenced in England by the infant beneficiary to secure the trust fund. The learned Vice-Chancellor decided that the testator was domiciled in America, and in the course of his judgment expressed the opinion that succession duty would become payable on the death of an annuitant, who was then still alive, on the ground that the fund was "a fund established in this Court, no matter by what means." The learned Vice-Chancellor seems to have based his opinion on *Campbell's Case* (1), stating that he did not understand that case to depend on the fact that the testator there had directed an English trust to be established. With the greatest respect to the learned Vice-Chancellor I think he was wrong if he meant that the mere fact of payment into Court of a settled fund, whatever might be the trusts affecting it and the circumstances under which it was paid in, would attract succession duty. Such a proposition seems to me to be too wide and inconsistent with Lord Cranworth's test. Moreover, I think the learned Vice-Chancellor took an erroneous view of the decision in *Campbell's Case* (1), which, in my opinion, was based on the fact that the testator there had directed an English trust to be established. In any event the opinion of the learned judge does not apply to the facts of the present case, as here no fund was ever established in an English Court.

Before leaving the authorities I would only add that I know of no case which supports the proposition that a will of a testator domiciled abroad effectively establishing a trust in respect of property locally situate in the country of his domicil has become an English settlement, because at the date of the death of the tenant for life the trustees

(1) L. R. 5 H. L. 524.

and beneficiaries happen to be residing in England and because the former had sought the protection of the English Courts in certain administrative acts and the latter had been made wards of an English Court. Such a proposition has at least the merit of novelty.

I now revert to the facts of the present case. Counsel for the Crown shrank from pointing to any particular act or event as having caused the will to become an English settlement, though Mr. Beebee, when pressed by the Court, seemed inclined to rely most strongly on the appointment of the English trustees in 1911 as being the crucial event The main contentions of the Crown were first that, as the language of s. 2 was wide enough to cover a disposition of property situate abroad made by a person domiciled abroad, the onus lay on the respondents to prove that the present will did not fall within it, and, secondly, if that were not the right view, that it was sufficient for the Crown to point to the facts existing at the date of the death of the tenant for life, as showing that at that date the will was an English settlement and that it was not the concern of the Crown to prove how and when the will had first become an English settlement.

As to the first of these contentions I think that it is ill-founded. As it is obvious that some limitation to the very wide words in the section must be implied, the duty of the Court is first to satisfy itself as a matter of construction what the true limitation to be implied is, and then to ascertain whether the case has been brought within the section according to its true construction. Lord Cranworth's test shows the proper limitation to be implied, and, according to that test, the present will, when first it became operative, clearly did not fall within it, therefore it rests on the Crown to prove that the will was subsequently brought under its provisions.

As to the second of these contentions it is obvious that in order that the Court should be in a position to appreciate the true state of affairs at the date of the death of the tenant for life it is incumbent upon the Crown to adduce evidence

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of the relevant events which had occurred prior to that date; proof of the allegation that the will had become an English settlement at a particular date in my opinion necessarily involves proof of how and when such alleged event had in fact happened. The death of the tenant for life does not of course confer any new succession on the infants, and the date of that death has no effect whatever on the character of the settlement; it is only material from the Crown's point of view, because if the will had prior to that date become an English settlement the duty would then have become payable.

The question of onus however is not really material in this case, as all the relevant facts have been placed before the Court by one or other of the parties and the Court is in a position to reach a definite conclusion on the whole of the facts.

In considering the facts relied upon by the Crown in support of the contention that the will had, before the death of the tenant for life, become an English settlement it is of the utmost importance to bear in mind that the trust property had not been realized by the trustees and remained locally situate in Hong Kong, and further that the ultimate beneficiaries were infants and therefore powerless to assent to or dissent from any of the acts of the tenant for life or of the trustees.

The appointment of new trustees in 1911 was effected in accordance with the laws of Hong Kong, where the appointor and consequently his wife and the infant beneficiaries were and remained domiciled. The motive which induced the appointment does not seem to me to be in the least material. In my opinion neither the appointment by the appointor of his wife and of the three other persons who were resident in this country to act jointly with himself, nor his subsequent retirement from the trusteeship (followed later by his resumption of office) had the effect of causing the will to become an English settlement. The mere vesting in the trustees of the legal title to the property in Hong Kong did not operate to bring that property into this country.

The trustees, in order to execute the trusts of the will, would have to seek the forum of the country where the testator was domiciled and the trust property was situate, and they would have to execute the trusts according to the laws of that country. The infant beneficiaries would, notwithstanding the appointment of trustees, claim title solely by virtue of the laws of that country. Even if the English Courts by virtue of their jurisdiction in personam had power to execute the trusts of the will, which is open to serious doubt, such Courts would, in executing such trusts, have to apply the law of Hong Kong. If the trustees were to go abroad the English Courts would have no power to allow service of a writ for the execution of the trusts of the will to be served upon them out of the jurisdiction, as such trusts are not trusts to be executed according to the law of England: see Order XI., r. 1 (*d*).

Further I am clearly of opinion that the giving of directions by the English Courts at the instance of the trustees in matters affecting the trusts of the Hong Kong property did not have the effect of causing the will to become an English settlement. In giving those directions the Courts could only have acted in exercise of their jurisdiction in personam and must have had regard to the Hong Kong law. How far the directions of an English Court would operate to exonerate the trustees if the trusts ever came to be executed by a Hong Kong Court I need not pause to consider.

If the appointment of trustees resident in England did not operate to make the will an English settlement it follows, in my opinion, that the fact that the infants acquired a right of action in England against such trustees, which is the natural consequence of the appointment, did not have any such operation.

The right which the infants have thus acquired is a right to have the trusts of the testator's will executed in the country where the testator was domiciled and where the trust property is situate. Such a right cannot, in my opinion, be properly called an English chose in action such

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as the right of the beneficiaries was held to be in *Attorney-General* v. *Lord Sudeley*. (1) The foundation of the judgments of the majority of the members of the Court of Appeal and of all the learned Law Lords in that case was that the testator there was domiciled in England where his will was proved and where his estate was being administered.

Lastly I find a difficulty in appreciating how the fact that the infants were made wards of Court here can affect the question whether the will under which they take beneficial interests has or has not become an English settlement. Such wardship does not alter the law by virtue of which they claim title to their shares in the testator's estate or affect their rights in any way. It would indeed be startling if the fact of the infants having been made wards of Court were to operate to their detriment by imposing upon them and their shares a liability for succession duty from which they would otherwise be free. In my judgment it has no such effect.

In the result I have arrived at the clear conclusion that, on the assumption that it might have been possible by some means to have caused the will of the testator to become an English settlement during the lifetime of the tenant for life, the manipulation of the parties which has in fact taken place in the present case has (in the absence of the realization of the Hong Kong property and of the transfer of the proceeds to this country) fallen short of having brought about that result.

Having reached this conclusion it becomes unnecessary for me to express a final opinion upon the broader question whether a disposition outside the Act, when made, could by any subsequent manipulation of the parties (short of an act amounting to a new disposition, which in this case would be impracticable owing to the infancy of the beneficiaries) become a disposition within the Act, though as at present advised I think that Mr. Maugham is right in his contention that consistently with Lord Cranworth's test it could not.

(1) [1896] 1 Q. B. 354; affirmed by H. L. [1897] A. C. 11.

I agree that the appeal succeeds with the consequences indicated by the Master of the Rolls.

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Appeal allowed.

Solicitors for appellants: *Elvy Robb & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

[IN THE COURT OF APPEAL.]

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ATTORNEY-GENERAL *v.* METROPOLITAN WATER BOARD.

Revenue—Income Tax—Water Board—Assessment on Profits of preceding Year—Debenture and Water Stock Interest—Deduction by Board of Sums representing Income Tax thereon—Profits "brought into charge to tax"—Liability to account for Tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. A, No. III., r.* 3; *All Schedules Rules, rr.* 19, 21.

Where a concern is assessable to income tax under the Income Tax Act, 1918, Sch. A, No. III., r. 3, on the profits of the preceding year, interest on its debenture or other stock paid during the year of assessment is not paid out of the profits "brought into charge to tax" within the All Schedules Rules, r. 21, for the words "brought into charge to tax" mean profits or gains which have been actually assessed to tax and on which either tax has been paid or an accrued liability for it arisen.

The Metropolitan Water Board is assessable to income tax under the Income Tax Act, 1918, Sch. A, No. III., r. 3, in respect of the year preceding the year of assessment. For the year ending March 31, 1922, the accounts of the Board showed a loss, and its assessment for the year of assessment ending April 5, 1923, was nil. During that year the Board in fact made large profits, out of which it paid interest on debentures and water stock. In these payments it made deductions in respect of income tax amounting to over 400,000*l.* The question arose whether the Board was liable to account in respect of this sum to the Revenue authorities under the All Schedules Rules, r. 21, on the ground that the interest had been paid out of profits not brought into charge to tax, or could retain the sum on the ground that the assessment for the year ending April 5, 1923 (although a nil assessment), rendered the profits of that year profits "brought into charge to tax" within r. 19:—

Held, that the expression "profits brought into charge to tax" in r. 19 meant profits which had been actually assessed to tax and on which the tax had been paid or an accrued liability to pay it incurred. As the profits of the Board during the year of assessment 1922–23 did not actually fall to be assessed to tax until the following year, the interest on

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debentures and water stock paid out of those profits during the year 1922–23 was paid out of profits not "brought into charge," so that the Board was liable to account to the Revenue authorities under the All Schedules Rules, r. 21, in respect of the deduction made from that interest of a sum representing the income tax thereon.

London County Council v. *Attorney-General* [1901] A. C. 26, 39, 40 applied.

Decision of Rowlatt J. affirmed.

APPEAL from a decision of Rowlatt J. on an information filed by the Attorney-General to recover from the Metropolitan Water Board a sum of 409,060*l.* 2*s.* 11*d.*, the balance in its hands after adjustment, in respect of sums deducted for income tax at the rate of 5*s.* in the pound by it from a total of 1,668,351*l.* 0*s.* 7*d.* distributed by it by way of interest on its stocks in the year of assessment 1922–23.

The facts as appeared from an agreed statement of facts were as follows :—

1. The Metropolitan Water Board (hereinafter called "the Board") was a body established by the Metropolis Water Act, 1902 (2 Edw. 7, c. 41), for the purpose of acquiring by purchase and of managing and carrying on undertakings of various companies mentioned in the Act and generally for the purpose of supplying water within the area laid down in that Act. In acquiring the undertakings of those companies the Board was required (s. 2, sub-s. 1, of the Act) to assume the obligations and liabilities of the companies whose undertakings were so acquired, including the redeemable debentures issued by those companies.

2. By s. 15 a water fund was established, to which all receipts of the Board had to be carried and out of which all payments by the Board had to be made.

3. By s. 16, sub-s. 1, the Board had power to borrow money for the objects therein specified, and by s. 16, sub-s. 2, it was provided that all money borrowed under the section should be raised by means of the issue of water stock under the Act unless the Local Government Board consented to some other mode of raising the money, and where the Local Government Board so consented, any money raised and the interest thereon should be charged on the water fund or on

such property or revenues of the Water Board, and in such manner as the Local Government Board might sanction.

4. For the purpose of enabling the Board to raise money, which it was authorized to borrow under its Acts, it had powers to create and issue stock known as the Metropolitan Water Stock, the principal and interest whereof were charged upon the water fund and on the revenues of the Board.

5. Under the provisions of s. 17 of the Act of 1902 the Board had issued water stock, and at March 31, 1923, there were issued and outstanding the following amounts of such stock :—

"A" Stock, 6,060,164*l.* 17*s.* 1*d.*, bearing interest at the rate of three per cent. per annum.

"B" Stock, 34,469,087*l.* 13*s.* 11*d.*, bearing interest at the rate of three per cent. per annum.

"C" Stock, 4,873,754*l.* 18*s.* 11*d.*, bearing interest at the rate of five and a half per cent. per annum.

In the course of that year 126,000*l.* "B" Stock had been redeemed and cancelled, but the interest on that stock payable before the dates of cancellation was included in the sum of 1,701,685*l.* 15*s.* 8*d.* below mentioned. The accounts of the Board were made up to March 31 in every year. The "B" and "C" Stocks were managed and the interest thereon paid by the Bank of England for account of the Board.

In addition to the stocks above mentioned the Board had (pursuant to s. 2, sub-s. 1, of the Act) assumed liability to pay interest upon certain redeemable debentures which had been issued by the companies whose undertakings had been acquired by the Board to the total amount of 7,217,838*l.*, and bearing interest as follows :—

£		
49,950	$2\frac{3}{4}$	per cent. redeemable debenture stock.
7,067,888	3	,, ,, ,, ,,
100,000	$3\frac{1}{2}$	,, , ,, ,,
£7,217,838		

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The total of the Board's Water Stock and of the debentures was 52,620,845*l.* 9*s.* 11*d.*, and the interest charge for the year ending March 31, 1923, in respect thereof was 1,701,685*l.* 15*s.* 8*d.*

6. In addition to the interest payable on the stock and debentures there were also certain annual payments due from the Board, which in the year ended March 31, 1923, amounted to 29,066*l.* 1*s.* 2*d.* The interest paid on such stock and debentures and the annual payments made for that year amounted to 1,730,751*l.* 16*s.* 10*d.*, made up as follows :—

	£	*s.*	*d.*
"A" Stock	181,804	19	0
"B" Stock	1,034,914	1	1
"C" Stock	268,056	10	5
Redeemable Debentures . . .	216,910	5	2
Other annual payments	29,066	1	2

It was agreed between the Commissioners of Inland Revenue and the Board that the figures above set out should for the purposes of the case be taken to represent the actual amount of interest paid on such stock and debentures and the other annual payments made during the year ending April 5, 1923.

Part of the sum of 1,730,751*l.* 16*s.* 10*d.* was paid gross (without deduction of income tax) by the Bank of England, while as to the sum of 1,668,351*l.* 0*s.* 7*d.* (the remainder) the Board or the Bank of England (as to the interest on the "B" and "C" Stocks) deducted therefrom on payment the sum of 435,617*l.* 3*s.* 0*d.* as the sum representing the tax thereon at the rate or rates in force during the period through which the interest and other annual payments of which the sum of 1,668,351*l.* 0*s.* 7*d.* was composed was accruing due.

Income tax at the rate of 5*s.* in the pound, being the rate in force during the year ending April 5, 1923, on 1,668,351*l.* 0*s.* 7*d.*, amounted to 417,087*l.* 15*s.* 2*d.*

7. The profits of the Board were assessable under Sch. A in accordance with Sch. A, No. III., r. 3, of the Income Tax Act, 1918, by reference to the profits of the year preceding

the year of assessment. For the year to March 31, 1923, the Board's accounts relating to the undertaking showed (after adjustment for income tax purposes) a profit of 2,481,085*l.*, out of which the Board paid the interest referred to in para. 6 hereof. This figure formed the basis for an assessment under Sch. A, No. III., made upon the Board for the year ended April 5, 1924, against the amount of which assessment an allowance (including sums carried forward from preceding years) in respect of wear and tear of plant and machinery fell to be made to the amount of 798,328*l.*, leaving a net figure of 1,682,757*l.* for that year.

The accounts relating to the undertaking of the Board for the year to March 31, 1922, disclosed (after adjustment for income tax purposes) a loss of 57,366*l.* 3*s.* 2*d.*, and therefore no assessment was made upon the Board under Sch. A, No. III., for the year ending April 5, 1923.

8. The increase in the profit made in the year to March 31, 1923, was due to the fact that the Board was enabled to raise its charges to the public in consequence of the passing of the Metropolitan Water Board (Charges) Act, 1921, which came into force on April 1, 1922.

9. The Board for the year ending March 31, 1923, paid income tax or suffered tax by deduction in respect of other income to the extent of 8027*l.* 12*s.* 3*d.* on the amount of 32,110*l.* 9*s.*, made up as follows :—

	Amount.			Tax paid or deducted.		
	£	*s.*	*d.*	£	*s.*	*d.*
Rent receivable (Sch. A) . .	7293	3	1	1823	5	9
Property owned and occupied by the Board (Sch. A) . .	11,849	14	0	2962	8	6
Interest on investments (excluding investments of accumulating Redemption Fund)	12,967	11	11	3241	18	0
	£32,110	9	0	£8027	12	3

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The Board also suffered tax by deduction for the year on 5019*l.* interest on investments of an accumulating Redemption Fund, but, for the purposes of the case, it was agreed that this interest was not to be taken into account, and, except as aforesaid, the Board did not become liable to pay by deduction or otherwise any income tax in the year ending March 31, 1923.

10. The Attorney-General contended that for the year ended April 5, 1923, the Board was liable to account to the Commissioners of Inland Revenue under r. 21 of the General Rules applicable to all Schedules of the Income Tax Act, 1918 (1), for the sum of 409,060*l.*, 2*s.* 11*d.* made up as follows :—

	£	*s.*	*d.*	
Tax at the rate of 5*s.* in the £ in respect of interest and annual payments . . .	417,087	15	2	(see para. 6)
Less tax on taxed income 32,110*l.* 9*s.*	8027	12	3	(see para. 9)
	£409,060	2	11	

11. The Board contended :—

(*a*) That the interest on the water stock and on the redeemable debentures and the annual payments referred to paid by the Board for the year 1922–23 were payable wholly out of profits or gains brought into charge to tax within r. 19 of the said Rules. (1)

(1) General Rules applicable to all Schedules, r. 19 : "(1.) Where any yearly interest of money, annuity, or any other annual payment (whether payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether payable half-yearly or at any shorter or more distant periods), is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been

(*b*) That the profits or gains brought into charge to tax for the year 1922–23 were profits of the Board of that year (namely the said 2,481,085*l.*) though the liability to income tax for that year was to be measured by the amount of the profits of the preceding year, and that this was so whether there were profits of the preceding year or not.

(*c*) That the said profits or gains of the Board brought into charge to tax for the year 1922–23 were sufficient in amount to meet the said interest and annual payments payable for that year, and the said interest was in fact paid and the said annual payments were in fact made out of those profits or gains.

(*d*) That the fact that no assessment was or could be made on the Board for the year 1922–23 was irrelevant.

(*e*) That the Board was entitled under r. 19 of the aforesaid Rules to retain for itself the income tax deducted on payment of the said interest and annual payments.

(*f*) That r. 21 of the said Rules had no application to the case.

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made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due.

The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid. . . ."

Rule 21: "(1.) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D . . . . not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

(2.) Any such person shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest, annuity, annual payment, royalty, or other sum respectively, as is not paid out of profits or gains brought into charge, as the case may be, and every such amount shall be a debt from him to the Crown and shall be recoverable as such; and the provisions contained in section two of the Stamp Duties Management Act, 1891, in relation to money in the hands of any person for stamp duty, shall apply to money deducted by any such person in respect of tax. . . . ."

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Rowlatt J. gave judgment for the Crown.

The Board appealed. The appeal was heard on October 28, 31; November 1 and 2, 1927.

Sir John Simon K.C., *Latter K.C.* and *Cyril King* for the appellant Board.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the Crown.

The arguments sufficiently appear from the judgments.

[The following cases were referred to: *Ormond Investment Co.* v. *Betts* (1); *Watney, Combe, Reid & Co.* v. *Berners* (2); *London County Council* v. *Attorney-General* (3); *Brown* v. *National Provident Institution* (4); *Ex parte Shaftesbury Homes and Arethusa Training Ship* (5); *Whelan* v. *Henning* (6); *Grainger* v. *Maxwell* (7); *Attorney-General* v. *London County Council* (8); *Lord Advocate* v. *City of Edinburgh* (9); *Sugden* v. *Leeds Corporation* (10); *Attorney-General* v. *Ashton Gas Co.* (11); *Pretoria-Pietersburg Ry. Co.* v. *Elwood.* (12)]

Cur. adv. vult.

Nov. 29. The following written judgments were delivered:—

LORD HANWORTH M.R. The Metropolitan Water Board appeal from a judgment given by Rowlatt J. on June 29, 1927, in favour of the Crown upon this information. It was brought to recover from the appellants a sum of 409,060*l.* 2*s.* 11*d.*, which was the balance in their hands after adjustment, in respect of sums deducted at the rate of 5*s.* in the pound by them from a total of 1,668,351*l.* 0*s.* 7*d.*, distributed by them by way of interest on stocks of the appellants in the year of assessment 1922–23. No question arises upon the figures. The question is one of principle—whether the appellants can rightly claim to hold this sum

(1) [1927] 2 K. B. 326; [1928] A. C. 143.
(2) [1915] A. C. 885; [1914] 3 K. B. 288.
(3) [1901] A. C. 26.
(4) [1921] 2 A. C. 222.
(5) [1923] 1 K. B. 393; [1922] 2 K. B. 729.
(6) [1926] A. C. 293.
(7) [1926] 1 K. B. 430.
(8) [1907] A. C. 131.
(9) (1903) 4 Tax Cas. 627.
(10) [1914] A. C. 483; 6 Tax Cas. 211.
(11) [1904] 2 Ch. 621.
(12) (1908) 6 Tax Cas. 508.

of 409,060*l.* 2*s.* 11*d.* against the claim made to it by the Crown. The facts are fully set out in the statement of facts. It is only necessary to recapitulate some of them for the purpose of this judgment.

For the purpose of the income tax the undertaking of the appellants falls to be assessed as "water-works," that is to say: "(7.) The profits of the Board are assessable under Schedule A in accordance with Schedule A, No. III., Rule 3, Income Tax Act, 1918, by reference to the profits of the year preceding the year of assessment. For the year to the 31st March, 1923, the Board's accounts relating to the said undertaking showed (after adjustment for income tax purposes) a profit of £2,481,085 out of which the Board paid the interest referred to in paragraph 6 hereof." I am reading the statement of facts. "This figure formed the basis for an assessment under Schedule A, No. III., made upon the Board for the year ended 5th April, 1924, against the amount of which assessment an allowance (including sums carried forward from previous years) in respect of wear and tear of plant and machinery fell to be made to the amount of £798,328 leaving a net figure of £1,682,757 for that year. The accounts relating to the undertaking of the Board for the year to the 31st March, 1922, disclosed (after adjustment for income tax purposes) a loss of 57,366*l.* 3*s.* 2*d.*, and therefore no assessment was due to be made or was made upon the Board under Schedule A, No. III., for the year ending 5th April, 1923. . . . . (10.) The Attorney-General contends that for the year ended the 5th April, 1923, the Board is liable to account to the Commissioners of Inland Revenue under Rule 21 of the General Rules applicable to all Schedules of the Income Tax Act, 1918, for the sum of 409,060*l.* 2*s.* 11*d.* . . . . (11.) The Board contends: (*a*) That the interest on the Water Stock and on the redeemable debentures and the annual payments referred to paid by the Board for the year 1922–23 were payable wholly out of profits or gains brought into charge to tax within Rule 19 of the said Rules. (*b*) That the profits or gains of the Board brought into charge to tax for the year

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1922–23 were the profits of the Board of that year (namely, the said 2,481,085*l.*), though the liability to income tax for that year was to be measured by the amount of the profits of the preceding year, and this was so whether there were profits of the preceding year or not. (*c*) That the said profits or gains of the Board brought into charge to tax for the year 1922–23 were sufficient in amount to meet the said interest and annual payments payable for that year and the said interest was in fact paid and the said annual payments were in fact made out of those profits or gains. (*d*) That the fact that no assessment was or could be made on the Board for the year 1922–23 is irrelevant."

The point, therefore, to be determined is whether the sum claimed is included within the words "payable wholly out of profits or gains brought into charge" in r. 19, so as to justify its retention by the appellants. Are those words to be interpreted as meaning "profits or gains that have in fact actually been brought into charge," or do they mean "profits and gains that are subject to charge and will in due course become factors in the assessment of the liability of the appellants to tax?"

By reason of the trading in the previous year 1921–22 resulting in a loss, the appellants pay no income tax for 1922–23, for the assessment upon them works out at nil; yet they claim that the substantial profits of 2,481,085*l.* for the year 1923, out of which the interest referred to was in fact paid, are to be treated as brought into charge for this same year, and so form the fund contemplated in r. 19 as the source out of which the interest of 1,668,351*l.* 0*s.* 7*d.* was paid, and 409,060*l.* 2*s.* 11*d.*, part of the latter sum, was retained by the appellants.

Rules 19 and 21 do not contain new matter. They reproduce s. 102 of the Income Tax Act, 1842, s. 40 of the Act of 1853, together with s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888. We have to construe the rules which have the force of the statute in which they are found, regardless of the curiosities in taxation which ingeniously may be suggested to arise as the result of a particular rendering of

the statute. I respectfully agree with what Lord Sumner said in *Watney, Combe, Reid & Co.* v. *Berners* (1): "We are not entitled to make any assumptions about the policy of the sections, but have simply to construe them."

This sum of 409,060*l.* 2*s.* 11*d.* has been stopped in the appellants' hands, because they were required to be "tax-collectors for the Crown"—to use Lord Loreburn's phrase in *Attorney-General* v. *London County Council.* (2) That duty is imposed upon them. It is an obligation that has been imposed upon those who make payments of any interest of money or annuities charged with income tax under Sch. D, since s. 24, sub-s. 3, of the Customs and Inland Revenue Act was passed in 1888. That section embraces what is now split up into rr. 19 and 21. Its terms make it plain that the person who is told to deduct the income tax chargeable upon the payee to whom the interest of money is paid in certain events must render an account of the amount so deducted. If the whole of the interest has not been paid out of profits or gains brought into charge, then the account must be of the whole amount deducted. If part only of the interest has not been paid out of profits or gains brought into charge, then the account must cover that part. The section makes it clear that the collector for the Crown will have to pass on the sum collected, either by means of his profits and gains brought into charge, or by rendering an account of the sum deducted which will not be subjected to charge in the collector's hands.

Looking, then, at the rules in the Consolidating Act of 1918, there is in my judgment good ground for the Attorney-General's argument that in r. 19 the words "payable wholly out of profits or gains brought into charge to tax" do not mean payment out of a fund that may be brought into charge, or is, or will be, a factor for the purpose of charge, but refer to a fund brought into charge out of which tax is payable and to be paid. So that in an account between the Crown, the appellants, as tax collectors for the Crown, and the stockholders, it would be clearly seen that the sum deducted from

(1) [1914] 3 K. B. 288, 297. (2) [1907] A. C. 131, 133.

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the payments to the stockholders was passed on to and reached the Crown. The appellants pay income tax. But their assessment is measured by annual value, and that annual value is " understood to be the profits of the preceding year " : see Sch. A, No. III., r. 3. That was in fact nil for 1923. True, income tax, charged under the respective schedules, is the same tax. But the appellants have to justify the retention by them of this sum collected for the Crown by deduction. That can be done where the yearly interest of money is payable wholly out of profits or gains brought into charge to tax. The appellants cannot alter their assessment to this tax, which stands for this same year at nil, and for the purpose of the rule rely on a charge which does not exist for this year. No tax for this year, 1923, has been paid by the appellants to the Crown. This reading of the rule is, in my judgment, confirmed by the passage in the speech of Viscount Haldane in *Sugden* v. *Leeds Corporation* (1) : " In each case the question is whether the annual payments taxed are actually and properly payable out of the profits. If they are, these profits are treated by the Acts as diminished pro tanto in the hands of the owner, and he, having paid once for all on the whole, is thus entitled to retain for his own benefit the amount of tax he deducts from the annual payments before making them, as being tax that he has already paid." See also per Lord Mersey. (2) Upon this principle it is no answer to the Crown to say that the profits of this year will in the next year " be understood to be " the annual value on which we will pay tax.

The case of *London County Council* v. *Attorney-General* (3) has a close application to the present case. Lord Macnaghten's observations (4) are in point. Dealing with the Act of 1888, which left the deduction of income tax no longer optional, he said (5) : " He is bound to make the deduction, and bound to pay over to the Crown the amount deducted unless the payment comes out of income which has already

(1) [1914] A. C. 483, 491.
(2) Ibid. 509.
(3) [1901] A. C. 26.
(4) Ibid. 39, 40.
(5) [1901] A. C. 40.

paid the duty." I do not think that he intends to lay emphasis on the word "paid"; for it may well be that chronologically the tax is deducted from a yearly payment, or half-yearly payment, when the tax charged upon the person who deducts would not fall to be actually paid till a few months later; "which has already paid the duty" may be treated as equivalent to brought into charge for the payment of duty upon it. Lord Davey's words are to the same effect. Inter alia, he says (1): "But the mortgagor cannot, of course, retain against the Crown more income tax than he has paid."

Both Lords Macnaghten and Davey intended that the right to retain was co-extensive only with the liability to tax of the fund out of which the interest is paid.

For these reasons, I think that the judgment of Rowlatt J. was right. The appeal must be dismissed with costs.

SARGANT L.J. The sum involved in this appeal is a large one. But the facts on which our decision depends are extremely simple, since we have not to deal with any question of precise figures, but only to decide a point of general principle.

Under the Act by which the appellants, the Metropolitan Water Board, were established—namely, the Metropolis Water Act, 1902—provision was made for the establishment of a water fund, to which all receipts of the Board have to be carried and out of which all payments by the Board have to be made. The Board had power to borrow money and to create and issue water stock, the principal and interest whereof are charged upon the water fund and on the revenues of the Board. By virtue of the issue of such water stock, and also by virtue of the assumption by the Board of liability under debentures issued by water companies whose undertakings had been acquired by the Board, there became charged upon and payable out of the water fund large annual sums, which in the year ending on April 5, 1923, amounted to some 1,730,000*l*. Much the greater portion of these sums,

(1) [1901] A. C. 46.

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amounting to over 1,668,000*l.*, was paid by the Board, after deducting therefrom income tax, which at the then rate of 5*s.* in the £ amounted to over 417,000*l.* But as against this sum there has to be set off a sum of over 8000*l.* in respect of income which the Board received after the deduction of income tax. And ultimately the net amount of income tax deducted by the Board, in respect of the balance of the payments made by the Board less income tax, over the payments received by the Board less income tax, has been agreed in these proceedings at the sum of 409,060*l.* 2*s.* 11*d.*

The accounts relating to the undertaking of the Board for the year ending on March 31, 1922, disclosed (after adjustment for income tax purposes) a loss of over 57,000*l.*, and therefore under the rules relating to the assessment of waterworks no assessment was due to be made or was made upon the Board under Sch. A, No. III., for the year ending April 5, 1923. The large profit made by the Board in that year was due to the Board having been empowered under the Metropolitan Water Board (Charges) Act, 1921, to raise their charges to the public.

The question to be determined in these proceedings is whether the Board are entitled to retain the above mentioned sum of 409,060*l.* 2*s.* 11*d.* for their own benefit, or are bound to account for it and pay it to the Commissioners of Inland Revenue. The solution of this problem depends almost entirely upon the meaning of the phrase "brought into charge" in r. 19 of the General Rules applicable to all Schedules of the Income Tax Act, 1918. The Crown contends that in the year in question, though profits and gains had in fact been made and would no doubt in ordinary course be "brought into charge" in the succeeding year, no profits and gains at all were brought into charge in the year in question, since for purposes of assessment they were based on the previous year and were assessed at nil. The Board contend that the phrase profits and gains "brought into charge" means profits and gains of a kind which is liable to be brought into charge, and accordingly that the actual profits and gains in the year of assessment are those to be

considered for the purposes of deduction, since they will in their turn be brought into charge in the following year.

It is curious that the precise point has never been decided, but this is probably due to the fact that in ordinary cases, where there is but little variation in the profits and gains in two succeeding years, it is of comparatively little importance which standard is adopted. And it may be that the practice of different surveyors of taxes has not been uniform. In *Sugden* v. *Leeds Corporation* (1) it appears that the figure taken for the purpose of deduction was that derived from the assessable figures based on previous years. In the *Arethusa* case (2) it would seem from an examination of the affidavit of the secretary, Mr. Coupland, that for a year or two the figure taken was that of the actual profits or gains in the year of assessment, but that subsequently the figure taken was that of the assessment based on previous years. In the result little, if any, assistance is to be derived from previous practice. The question has to be decided as a fresh question, and on the words of the statute.

In my opinion the words "brought into charge" are more naturally and satisfactorily satisfied by the meaning placed on them by the Crown. The past participle "brought" naturally refers to something that has been completed in the year in question, if not by actual payment at any rate by accrued liability to pay. It is only in a looser sense that it can be applied to a payment or liability to pay in respect of a succeeding year. And this latter construction would involve the anomaly that, if the undertaking ceased at the end of the year of assessment, a deduction would be allowed to the Board for which they would never have to account at all.

Further, I think that the Attorney-General was right in his submission that, when once you have ascertained under the Income Tax Act, 1918, the annual value of the undertaking of the Board for the year 1922–23, you must use the basis of that value for the other purposes of income tax for that year. The Board here are claiming on the one hand to escape any direct assessment of tax on the undertaking

(1) 6 Tax Cas. 211. (2) [1922] 2 K. B. 729; [1923] 1 K. B. 393.

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on the ground that their profits are to be taken as nil for the year 1922–23, and on the other hand to escape the obligation to hand over the income tax deducted from the holders of water stock on the ground that profits were brought into charge for that year to an extent exceeding the amount of the interest on the water stock. This involves using one basis of ascertainment for one purpose and another basis for another purpose, and seems to me to involve an inconsistency. This inconsistency is not cured, though in many cases its results may be minimized, by the consideration that there may be compensating inconsistencies in other years which may ultimately prevent any considerable loss on balance to the Revenue.

The case of *London County Council* v. *Attorney-General* (1) tends strongly in the same direction. It is not conclusive against the Board here, because the actual decision was that the income tax paid under any of the various statutory schedules was essentially a single tax, and that, in calculating the amount of the deductions in respect of dividends on their stocks, which the London County Council were entitled to retain for their own benefit, the London County Council could take into account any income tax paid either under Sch. A or under Sch. D. But it is impossible to read the judgments in that case, and particularly those of Lord Macnaghten and Lord Davey (2), without observing that attention is throughout directed to the actual sums paid in or for the year of assessment whether under Sch. A or under Sch. D. No doubt there are certain slight differences between the Income Tax Act then in force and the present Act, and the earlier Act is somewhat clearer on the point than the present. But this fact does not aid the appellants and indeed may be slightly against them. For the differences between the two Acts are in respect of arrangement only and not of substance, and it cannot be seriously suggested that the present Act was intended to make any alteration of the earlier Act with regard to the substance of the matter now in question.

(1) [1901] A. C. 26. (2) [1901] A. C. 39, 40, 42, 45, 46.

Finally, the attitude adopted by the Board is in my judgment inconsistent with the view of the legislation so clearly recognized in *London County Council* v. *Attorney-General* (1), that in making compulsory deductions from the dividends due to their stockholders and handing these deductions to the Crown the taxpayer is acting merely as a tax collector for the Crown. If that is so, it is strange that his obligation to pay what he has collected should be cancelled to any extent exceeding his actual payment of income tax (including an accrued obligation to pay) for the same period. A statutory set-off would naturally be of like against like, not of a deduction or accrued right to deduct against an expectation merely of an obligation to pay income tax in a future period.

In my opinion, therefore, the learned judge was quite right, and the appeal should be dismissed.

LAWRENCE L.J. The validity of the claim of the appellants to retain against the Crown the sum which they have deducted in respect of income tax from the interest paid by them to their stockholders during the year of assessment 1922–23 depends upon whether they are right in their contention that the expression "profits or gains brought into charge to tax" in r. 19 of the All Schedules Rules in the Income Tax Act, 1918, means the profits or gains actually earned in the year of assessment, and not, as the Crown maintains, the profits or gains in respect of which income tax for that year has been assessed and charged on the appellants by virtue of the Act.

In order to determine what is the true meaning of the expression "profits or gains brought into charge to tax" in r. 19, it is necessary to refer shortly to the relevant provisions of the Act. Sect. 1 of the Act provides (so far as material for the purposes of this case) that income tax shall be charged in respect of all property described or comprised in Sch. A in accordance with the rules applicable to that schedule. Sch. A provides that tax under that

(1) [1901] A. C. 26.

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schedule shall be charged in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom for every twenty shillings of the annual value thereof. No. III. of the Rules applicable to Sch. A provides (inter alia), by r. 3, that in case of waterworks the annual value shall be understood to be the profits of the preceding year, and, by r. 4, that tax under the preceding rule shall be assessed and charged on the body of persons carrying on the concern. The effect of these provisions as applied to the facts of the present case is that income tax for the year 1922–23 is assessed and charged on the appellants in respect of the annual value of their undertaking in that year, and that the factor for ascertaining that annual value is the profits made by the appellants in 1921–22. In other words, the practical result is that the taxable income of the appellants for the year 1922–23 is the income of the appellants for the year 1921–22. This is plain and not disputed; it is the basis on which the appellants have returned their taxable income for the year 1922–23 at nil.

Rules 19 and 21 are mere machinery for facilitating the collection by the Crown of the income tax imposed by the Act, and it would be a singular thing to find that in such rules there had been introduced for the first time, and without any explanation, a reference to profits or gains calculated on a basis entirely different from the basis laid down in the earlier provisions of the Act and rules; moreover, without any provision enabling the Crown to demand a return of or otherwise ascertain such profits or gains. In the circumstances I should have thought that it was not really open to doubt that the qualifying words "brought into charge to tax" in the expression "profits or gains brought into charge to tax" in r. 19 were inserted expressly to denote that the profits or gains there referred to were the profits or gains in respect of which a charge to income tax had been imposed on the appellants by virtue of the Act, that is to say, the taxable income and not the actual income. Sir John Simon, however, strenuously contended that to so construe the expression was to confuse the subject-matter

of the operation of assessment with the result of the operation of assessment, and that the real subject-matter of assessment was the actual income earned in the year of assessment, although that income had to be computed for the purpose of the charge to tax by reference to the income of the preceding year. In my judgment this contention is not well founded. Regard being had to the scheme of the Act and rules, and particularly to the provisions to which I have referred, the words " brought into charge to tax " would be wholly inept as applied to the profits actually earned by the appellants during the year of assessment. Such profits form no factor in ascertaining the taxable income for the year of assessment, and the Act imposes no charge to tax on the appellants in respect of them ; they do not constitute the annual value of the appellants' works within the meaning of the Act, and are in no way " brought into charge " under any of the provisions of that Act.

Sir John Simon placed considerable reliance upon the introductory words of r. 19 : " Where any yearly interest of money, annuity, or any other annual payment . . . . is payable wholly out of." His contention was that this phrase necessarily carried with it the implication that the profits or gains brought into charge which immediately follow were the actual profits or gains earned in the year of assessment, as no annual payments could properly be said to be payable out of income computed on an artificial basis. The phrase so relied upon is perhaps not very happily worded, but in my judgment its meaning is plain. It is used for the purpose of defining the character of the annual payments to which r. 19 is applicable, and not for the purpose of denoting the moneys out of which the annual payments will in fact be made. The words " payable out of " are there used as equivalent to " properly chargeable against." The meaning and effect of the rule is that, in order to come within its scope, the annual payments must be of such a character that they can properly be charged against the taxable income—e.g., if the taxable income consists of the profits of a business, the annual payment must be one that is charged upon the profits of that

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business, and not a payment unconnected with it. That this is the correct reading of the rule is, I think, borne out by the remarks of Lord Watson and of Lord Herschell in *Gresham Life Assurance Society* v. *Styles* (1), and of Lord Davey in *London County Council* v. *Attorney-General*. (2) In the latter case Lord Davey, after stating that it is not necessary that the interest or annual payment should be exclusively charged upon or payable out of profits or gains brought into charge, proceeds in these words: "It is enough if the interest is charged upon or payable out of the taxable income, though there may be other subjects of charge," which words in my opinion show that Lord Davey read the phrase relied upon by Sir John Simon in the sense in which I have endeavoured to explain that it ought to be construed.

Some stress was laid by counsel for the appellants on the fact that the actual profits for the year 1922–23 would form the basis of taxation for the following year 1923–24, as showing that in this and all similar cases matters will ultimately be adjusted, and that therefore no weight ought to be attributed to the argument of the Crown that on the appellants' construction of r. 19 the appellants would, in the events which have happened, become tax collectors for their own benefit. The plain answer to this, however, is that income tax is a tax for a year, and that it is immaterial to consider what may or may not happen in the year or years following the year of assessment. The words "brought into charge" cannot properly be held to refer to profits which are only liable to be brought into charge in the future, and in my opinion they mean profits brought into charge in the year of assessment.

In the result I have arrived at the conclusion that the expression "profits or gains brought into charge to tax" in r. 19 means the taxable and not the actual profits or gains in the year of assessment. It follows that under the provisions of rr. 19 and 21 no taxpayer can retain against the Crown any more income tax deducted by him in any year of assessment than he has himself paid or become liable to pay to

(1) [1892] A. C. 309, 320, 324. (2) [1901] A. C. 26, 46.

the Crown for that year. This construction, besides giving proper effect to the particular language of the rules in question, seems to me entirely to accord with the intention of the Legislature as appearing from the Act and rules as a whole. It avoids the incongruity which would result from the construction contended for by the appellants, of a taxpayer using one basis for the ascertainment of his taxable income, and then turning round and using another basis when confronted with a claim by the Crown under r. 21. It also avoids the anomaly of a taxpayer, whose taxable income for the year of assessment is nominal, but whose actual income for that year is substantial, becoming entitled to retain for his own benefit income tax collected by him from the persons to whom he has made annual payments, and who, but for the provisions of r. 19, would have had to pay their income tax to the Crown direct. It also avoids the further anomaly of a taxpayer whose taxable income for the year of assessment is substantial, but whose actual income during that year is nominal, from being exposed to a double charge of tax in respect of the annual payments he has had to make during that year.

For the reasons stated I think that the decision of Rowlatt J. is right, and that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for appellants: *C. A. Hunt.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

W. I. C.

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